DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-530
Title: National Aeronautics and Space Administration, et al., Petitioners
v.
Robert M. Nelson, et al.
Docketed: November 2, 2009
Linked with 09A198
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-56424)
Decision Date: June 20, 2008
Rehearing Denied: June 4, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 21 2009	Application (09A198) to extend the time to file a petition for a writ of certiorari from September 2, 2009 to October 2, 2009, submitted to Justice Kennedy.
Aug 25 2009	Application (09A198) granted by Justice Kennedy extending the time to file until October 2, 2009.
Sep 22 2009	Application (09A198) to extend further the time to file a petition for a writ of certiorari from October 2, 2009 to November 1, 2009, submitted to Justice Kennedy.
Sep 23 2009	Application (09A198) granted by Justice Kennedy extending the time to file until November 1, 2009.
Nov 2 2009	Petition for a writ of certiorari filed. (Response due December 2, 2009)
Nov 2 2009	Appendix of National Aeronautics and Space Administration, et al. filed.
Nov 23 2009	Order extending time to file response to petition to and including January 4, 2010.
Dec 23 2009	Order further extending time to file response to petition to and including February 3, 2010.
Feb 3 2010	Brief of respondents Robert M. Nelson, et al. in opposition filed.
Feb 17 2010	DISTRIBUTED for Conference of March 5, 2010.
Feb 19 2010	Reply of petitioners National Aeronautics and Space Administration, et al. filed. (Distributed)
Mar 8 2010	Petition GRANTED.
Apr 8 2010	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including May 13, 2010.
Apr 8 2010	The time within which to file respondents' brief on the merits is extended to and including July 6, 2010.

May 5 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
May 11 2010	Further extension of time within which to file the joint appendix and petitioners' brief on the merits to and including May 20, 2010.
May 11 2010	Further extension of time within which to file respondents' brief on the merits to and including July 19, 2010.
May 20 2010	Brief of petitioners National Aeronautics and Space Administration, et al. filed.
May 20 2010	Joint appendix filed. (Statement of costs filed)
May 27 2010	Brief amici curiae of Consumer Data Industry Association, et al. filed.
Jul 6 2010	Further extension of time within which to file respondents' brief on the merits to and including August 2, 2010.
Jul 20 2010	CIRCULATED.
Jul 20 2010	SET FOR ARGUMENT ON Tuesday, October 5, 2010.
Jul 27 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Jul 27 2010	Record received from U.S.D.C. for the Central District of CA. (1 box)
Aug 2 2010	Brief of respondents Robert M. Nelson, et al. filed. (Distributed)
Aug 5 2010	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Aug 9 2010	Brief amici curiae of Electronic Privacy Information Center, et al. filed. (Distributed)
Aug 9 2010	Brief amicus curiae of Electronic Frontier Foundation filed. (Distributed)
Aug 9 2010	Brief amicus curiae of Drug Policy Alliance filed. (Distributed)
Aug 9 2010	Brief amicus curiae of American Astronomical Society filed. (Distributed).
Aug 9 2010	Brief amicus curiae of Union of Concerned Scientists filed. (Distributed).
Aug 9 2010	Brief amicus curiae of California Employment Lawyers Association filed. (Distributed)
Sep 1 2010	Reply of petitioners National Aeronautics and Space Administration, et al. filed. (Distributed)
Sep 7 2010	Justice Kagan is recused in this case.
Oct 5 2010	Argued. For petitioners: Neal K. Katyal, Acting Solicitor General, Department of Justice, Washington, D.C. For respondents: Dan Stormer, Pasadena, Cal.

PETITION FOR WRIT OF CERTIORARI

09-530 NOV 12 2009

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee's response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. 552a.

2. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the reference's response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. 552a.

PARTIES TO THE PROCEEDING

Petitioners are the National Aeronautics and Space Administration (NASA); Charles F. Bolden, Jr., Administrator of NASA, in his official capacity; the Department of Commerce; and Gary Locke, Secretary of Commerce, in his official capacity.

Respondents are the California Institute of Technology, a defendant below, and 28 contract employees at NASA's Jet Propulsion Laboratory, who were plaintiffs below: Robert M. Nelson, William Bruce Banerdt, Julia Bell, Josette Bellan, Dennis V. Byrnes, George Carlisle, Kent Robert Crossin, Larry R. D'Addario, Riley M. Duren, Peter R. Eisenhardt, Susan D.J. Foster, Matthew P. Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J. Haw, James Kulleck, Sharon L. Laubach, Christian A. Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P. McElrath, Susan Paradise, Konstantin Penanen, Celeste M. Satter, Peter M.B. Shames, Amy Snyder Hale, William John Walker, and Paul R. Weissman.

The complaint named Does 1-100 as defendants but they were not identified as parties in the court of appeals.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Constitutional and statutory provisions involved 2
Statement 2
Reasons for granting the petition 15
I. The court of appeals decided an important constitutional question without giving due regard to this Court's precedents 16
II. The decision below diverges from decisions of other circuits upholding similar background checks 25
Conclusion 30

TABLE OF AUTHORITIES

Cases:

AFGE v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997) 13, 26, 27, 28
Crawford, In re, 194 F.3d 954 (9th Cir. 1999) 11
Doe v. *Attorney Gen. of the United States*, 941 F.2d 780 (9th Cir. 1991) 11, 12, 18
Engquist v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146 (2008) 21
Fraternal Order of Police v. *City of Philadelphia*, 812 F.2d 105 (3d Cir. 1987) 29
Greenawalt v. *Indiana Dep't of Corr.*, 397 F.3d 587 (2005) 11
NTEU v. *United States Dep't of the Treasury*, 25 F.3d 237 (5th Cir. 1994) 13, 27, 28

Cases—Continued: Page

Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) 14, 17, 18, 19
Smith v. *Maryland*, 442 U.S. 735 (1979) 21
United States v. *Miller*, 425 U.S. 435 (1976) 10, 21
Walls v. *City of Petersburg*, 895 F.2d 188 (4th Cir. 1990) 29
Washington v. *Glucksberg*, 521 U.S. 702 (1997) 20
Whalen v. *Roe*, 429 U.S. 589 (1977) 14, 16, 17, 19, 20

Constitution, statutes and regulation:

U.S. Const.:
Amend. IV 9, 10, 11, 21
Amend. V (Due Process Clause) 2
National Aeronautics and Space Act of 1958, 42 U.S.C. 2451 *et seq.*:
42 U.S.C. 2455 8
42 U.S.C. 2456 8
42 U.S.C. 2456a 8
42 U.S.C. 2473 8
Privacy Act of 1974, 5 U.S.C. 552a 2, 3
5 U.S.C. 552a(b) 4, 19
5 U.S.C. 552a(d) 4, 19, 23
5 U.S.C. 552a(e)(1) 4, 19, 23
5 U.S.C. 552a(f) 4, 23
5 U.S.C. 7311 note 3
Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953) 3

Miscellaneous: Page

Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of All Departments and Agencies (Aug. 5, 2005) <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-24.pdf> 7

70 Fed. Reg. 61,320 (2005) 6

Nat'l Inst. of Standards & Tech., Dep't of Commerce, *Personal Identity Verification (PIV) of Federal Employees and Contractors, Federal Information Processing Standards Publication* (Mar. 2006) <http://csrc.nist.gov/publications/fips/fips201-1/FIPS-201-1-chng1.pdf> 6, 7

Homeland Security Presidential Directive / HSPD 12—Policy for a Common Identification Standard for Federal Employees and Contractors, Pub. Papers 1765-1766 (2004) 6

In the Supreme Court of the United States

No.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

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ROBERT M. NELSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Aeronautics and Space Administration (NASA) and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 530 F.3d 865. A prior opinion of the court of appeals (Pet. App. 30a-49a) is reported at 512 F.3d 1134. The order and opinions of the court of appeals on denial of rehearing en banc (Pet. App. 75a-130a) are reported at 568 F.3d 1028. The opinion of the district court denying respondents' motion for a preliminary injunction (Pet. App. 54a-74a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2008. A petition for rehearing was denied on June 4, 2009 (Pet. App. 75a-130a). On August 25, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 2, 2009. On September 23, 2009, Justice Kennedy further extended the time to and including November 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any person be * * * deprived of life, liberty, or property, without due process of law." Pertinent portions of the Privacy Act of 1974, 5 U.S.C. 552a, are reproduced in the appendix to this petition. Pet. App. 131a-136a.

STATEMENT

Government agencies are required by Presidential directive and implementing standards to conduct a minimum level of background investigation before providing federal contract employees with the identity credentials necessary to work at federal facilities. The forms used for this process are the same ones that have long been used to conduct background checks for applicants for federal employment. Respondents are federal contract employees working at NASA's Jet Propulsion Laboratory who object to the background-check process. In their view, the government's collection of certain information relevant to their eligibility for federal cre-

dentialing violates a constitutional right to informational privacy. The district court disagreed and denied respondents' request for a preliminary injunction. Pet. App. 54a-74a. The court of appeals reversed and ordered the entry of a preliminary injunction barring the use of the forms for the background checks of respondents. *Id.* at 1a-29a.

1. Since 1953, the federal government has required a minimum level of background investigation for federal employees in the civil service. See Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953) (5 U.S.C. 7311 note). The standard background-check process is called the National Agency Check with Inquiries (NACI). Pet. App. 3a-4a. That process includes, at a minimum, the completion of two forms: Standard Form 85 (SF-85), Questionnaire for Non-Sensitive Positions, which is completed by the applicant, see *id.* at 137a-144a; and Form 42, Investigative Request for Personal Information, which is completed by references identified by the applicant, see *id.* at 145a-146a.

a. SF-85 asks the federal job applicant a variety of questions designed to determine whether the applicant is "suitable for the job." Pet. App. 137a. The form notifies the applicant that "[g]iving us the information we ask for is voluntary," *ibid.*; that the information is used "for the purpose of determining your suitability for Federal employment," *id.* at 138a; and that the government "will protect [the information provided] from unauthorized disclosure," *ibid.* In particular, SF-85 states that "[t]he collection, maintenance, and disclosure of background investigative information is governed by the Privacy Act." *Ibid.* The Privacy Act permits a federal agency to maintain in its records "only such information about an individual as is relevant and necessary to ac-

complish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. 552a(e)(1). The Act requires agencies to give individuals access to records that pertain to them, 5 U.S.C. 552a(d), and to request amendments to their records, 5 U.S.C. 552a(f). Subject to certain limited exceptions, the Act also prohibits agencies from disclosing any record about an individual maintained in a system of records without the written consent of that individual. 5 U.S.C. 552a(b).

SF-85 requests basic biographical information such as where the applicant has lived, worked, and gone to school. Pet. App. 139a-142a. The form asks the applicant to provide contacts who can verify former residences, jobs, and schooling, and to provide the names of three persons who know the applicant well and thus can serve as references. *Id.* at 140a-142a. The form also asks whether, in the last year, the applicant has used, possessed, supplied, or manufactured illegal drugs, while advising the applicant that "[n]either your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding." *Id.* at 143a. If an applicant answers "yes" to the question regarding drug use, she is asked to "provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs," "[i]nclud[ing] any treatment or counseling received." *Ibid.* Finally, the form requests the applicant's authorization for the release of information, so that federal investigators may contact individuals listed on the form, verify the information provided, and inquire about the applicant's suitability for employment. *Id.* at 144a.

b. Form 42 is a two-page form that is sent to persons listed on SF-85 as references, former landlords, or persons who can verify periods of self-employment and/or unemployment. See Pet. App. 145a-146a.[1] Form 42 advises its recipient that it is seeking information relevant to the applicant's "suitability for employment or security clearance." *Id.* at 145a. It asks how long the recipient has known the applicant and how often the recipient associates or has associated with the applicant. *Id.* at 146a. It then asks a series of yes/no questions, including whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness," *ibid.* (Item 6), or has "any adverse information about [the applicant's] employment, residence or activities" concerning "violations of the law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters," *ibid.* (Item 7). If the answer is "yes," Form 42 asks the recipient to "explain in Item 8," which in turn asks the recipient for "additional information which you feel may have a bearing on [the applicant's] suitability for government employment or a security clearance," noting that "this space may be used for derogatory as well as positive information." *Ibid.* (capitalization altered). Form 42 concludes by asking whether the recipient would recommend the applicant for a government security clearance or employment. *Ibid.* The Office of Personnel Management (OPM) estimates that approximately 980,000 Form 42 inquiries are sent out each year, and that Form 42

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[1] Similar forms are sent to the educational institutions (Form 43) and former employers (Form 41) identified by the applicant.

should take approximately five minutes to complete. See 70 Fed. Reg. 61,320 (2005).

2. The background-check process long required for federal civil service employees recently has been made applicable to contract employees at federal facilities. In 2004, the President issued a directive to the Department of Commerce to develop a mandatory and uniform "Federal standard for secure and reliable forms of identification" to control access to federally controlled facilities and information systems. *Homeland Security Presidential Directive / HSPD 12—Policy for a Common Identification Standard for Federal Employees and Contractors*, Pub. Papers 1765-1766 (2004) (*HSPD-12*). The President charged the Office of Management and Budget (OMB) with ensuring compliance with that standard. *Id.* at 1765. The President explained that the directive was designed to improve the security of federally controlled facilities and information systems, increase government efficiency, reduce identity fraud, and protect personal privacy. *Ibid.* The directive applies to all Executive Branch departments and agencies. *Ibid.*; Pet. App. 56a.

In accordance with *HSPD-12*, the Department of Commerce put in place a minimum standard for the issuance of identity credentials to federal contract employees. Pet. App. 57a; see Nat'l Inst. of Standards & Technology, Dep't of Commerce, *Personal Identity Verification (PIV) of Federal Employees and Contractors, Federal Information Processing Standards Publication* at v (Mar. 2006) (*FIPS 201-1*) <http://csrc.nist.gov/publications/fips/fips201-1/FIPS-201-1-chng1.pdf>. As relevant here, that standard includes the initiation of a background check using the NACI process, involving SF-85 and Form 42, described above. Pet. App. 57a.

FIPS 201-1 establishes (at 7-8, 44) detailed privacy requirements to protect the information received.[2]

OMB then issued a memorandum to guide the implementation of the federal credentialing standard. Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of All Departments and Agencies (Aug. 5, 2005) <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-24.pdf> (C.A. App. 449-461). That memorandum required all federal agencies to begin the required background investigation process for employees of current contractors by October 27, 2007. C.A. App. 454.

3. The Jet Propulsion Laboratory (JPL) is a federal research and development facility owned by NASA. Pet. App. 56a. JPL is the leading NASA center for deep space robotics and communications missions, and it is renowned for its work in developing satellites, rockets, missiles, spacecraft, and telescopes. See *id.* at 96a, 98a-99a (Callahan, J., dissenting from denial of rehearing en banc); C.A. App. 470.

JPL is operated by the California Institute of Technology (Caltech) pursuant to a contract with NASA. All positions at JPL are filled by contract employees. C.A. App. 470. These employees, hired by Caltech, perform duties functionally equivalent to those of federal civil service employees at other NASA centers, and they have access to NASA physical facilities and information technology systems that is similar to the access of their civil service counterparts. *Id.* at 469-470.

In 2005, NASA established a new agency-wide policy for the issuance of security credentials. Pet. App. 5a; see C.A. App. 511 (NASA Procedural Requirement

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[2] Although *FIPS 201-1* authorizes the use of the NACI or an alternative investigation approved by OPM (*FIPS 201-1*, at 6), NASA has not sought to utilize an alternative investigation.

(NPR) 1600.1).[3] As relevant here, the new policy required that all contract employees working at JPL undergo the NACI background investigation process before receiving security credentials. *Ibid.* That change was designed to bring NASA into compliance with the requirements for all agencies under *HSPD-12*. Pet. App. 57a. The new procedures also responded to NASA's own conclusion that failing to conduct background checks of contract employees would pose a security vulnerability for the agency. C.A. App. 471.

In 2007, NASA modified its contract with Caltech to require that contract employees working at JPL undergo the NACI process. Pet. App. 5a; C.A. App. 473, 649-652, 658-659. NASA initiates the necessary background investigation by collecting a contract employee's completed SF-85, which it submits to OPM for investigation. *Id.* at 473. OPM sends inquiries, including Form 42, to various individuals and institutions listed on SF-85. Pet. App. 4a. OPM then furnishes a report of the investigation to NASA, and NASA determines whether to grant access, deny access, or investigate further. C.A. App. 474.

4. The individual respondents are 28 Caltech employees working at JPL. Pet. App. 55a. Seeking to represent a class of similarly situated employees, respondents sued NASA, the Department of Commerce, Caltech, and others, and moved for a preliminary injunction to bar implementation of the background-check process at JPL. *Ibid.*; C.A. App. 1501-1523.[4] They argued,

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[3] NASA promulgated the policy pursuant to its authority under the National Aeronautics and Space Act of 1958, 42 U.S.C. 2455, 2456, 2456a, and 2473.

[4] The case has not been certified as a class action.

inter alia, that the background checks would violate the Fourth Amendment, the Privacy Act, and a constitutional right to informational privacy.[5]

The district court denied respondents' motion for a preliminary injunction. Pet. App. 54a-74a. The court first rejected respondents' Fourth Amendment claim, *id.* at 63a-64a, explaining that respondents "make no argument that a questionnaire, background check, or authorization to release records constitutes a 'search,'" and that, in any event, "there has not been an actual invasion of privacy, but only a potential invasion since the government has not yet checked any of [respondents'] backgrounds," *id.* at 64a. The court then rejected the Privacy Act claim because "SF-85 specifically states that it complies with the Privacy Act" and respondents have not shown that "information collected via SF-85 was not properly maintained or gathered" for purposes of the Act. *Id.* at 67a.

Finally, the court concluded that respondents had not established a likelihood of success on the merits of

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[5] Respondents also alleged that the background-check process violates the Administrative Procedure Act (APA) because it is not authorized by statute and violates various provisions of the California Constitution. Pet. App. 55a; C.A. App. 1520, 1522. The district court rejected the APA claim, Pet. App. 65a-66a, and did not expressly rule on the state-law claims. Respondents appealed on the APA claim, but the court of appeals rejected it, *id.* at 11a-13a.

Respondents also alleged that, once the background-check process was complete, NASA would rely on improper factors to determine whether to issue to contract employees credentials for access to federal facilities. C.A. App. 1515-1516. The government denies that it made such determinations based on improper factors, but that claim is not at issue here, because the district court (Pet. App. 62a-63a) and the court of appeals (*id.* at 8a-9a) concluded that respondents lack standing to bring the claim and that the claim is not ripe for review.

their claim that the background-check process violates a constitutional right to informational privacy. Pet. App. 68a-73a. The court noted that SF-85 "does not seek extensive or overly-sensitive information," and that there are "very high-tech and sensitive devices at JPL, such as satellite monitoring equipment, that warrant strict security measures." *Id.* at 72a. The court concluded that the government's collection of information about respondents was narrowly tailored to advance the government's legitimate interest in enhancing security at federal facilities. *Id.* at 68a-72a.

5. Respondents appealed, challenging the district court's rulings on the Fourth Amendment and informational privacy, but not on the Privacy Act. A motions panel of the court of appeals granted respondents an injunction pending appeal, which is still in effect. Pet. App. 50a-53a. A merits panel then reversed the district court's denial of a preliminary injunction. *Id.* at 30a-49a. In response to the government's petition for rehearing en banc, the merits panel withdrew its initial opinion and issued a revised opinion. *Id.* at 1a-29a.

The court held that respondents were unlikely to succeed on their Fourth Amendment claim. The court explained that requests for information from third parties would be deemed "searches" only if the individual has a "reasonable expectation of privacy" in the information being sought—a requirement that is not satisfied "merely because that information is of a 'private' nature." Pet. App. 13a. The court determined that Form 42's questions are permissible under those principles because "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *Id.* at 15a (quoting *United States* v. *Miller*, 425 U.S. 435, 443

(1976)). The court also rejected the Fourth Amendment challenge to SF-85. Relying on the Seventh Circuit's decision in *Greenawalt* v. *Indiana Department of Corrections*, 397 F.3d 587 (2005) (Posner, J.), the court reasoned that disclosure of information through "direct questioning" is not a Fourth Amendment search. Pet. App. 16a-17a.

The court of appeals concluded, however, that the district court had erred in finding that respondents were unlikely to succeed on the merits of their constitutionally-based informational privacy claim, Pet. App. 26a, holding that respondents had raised sufficiently serious questions on that claim to warrant a preliminary injunction, *id.* at 8a, 29a. See *id.* at 17a-26a. The court explained, without citing to any decision of this Court, that it had "repeatedly acknowledged that the Constitution protects an 'individual interest in avoiding disclosure of personal matters.'" *Id.* at 17a (quoting *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999)). In the court's view, the government must justify its collection of personal information by showing "that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Id.* at 18a (quoting *Crawford*, 194 F.3d at 959).

The court described this inquiry as a balancing of "the government's interest in having or using the information against the individual's interest in denying access." Pet. App. 18a (quoting *Doe* v. *Attorney Gen. of the United States*, 941 F.2d 780, 796 (9th Cir. 1991)). The court provided a non-exclusive list of potentially relevant factors, including "the type of [information] requested," "the potential for harm in any subsequent nonconsensual disclosure," "the adequacy of safeguards

to prevent unauthorized disclosure," "the degree of need for access" to the information, "and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest" justifying that access. *Ibid.* (quoting *Doe*, 941 F.2d at 796).

The court first applied its test to the questions on SF-85. Pet. App. 19a-22a. The court determined that "most of the questions * * * are unproblematic and do not implicate the constitutional right to informational privacy," *id.* at 19a, and that the specific question requiring disclosure of prior drug activity is narrowly tailored to achieve the government's legitimate interest in uncovering and addressing illegal drug activity among its contract employees, *id.* at 20a-21a. But the court decided that the government may not ask an applicant who has used drugs whether she has obtained treatment or counseling, because, in the court's view, the government does not have "any legitimate interest" in seeking such information. *Id.* at 22a.

The court found Form 42 "much more problematic." Pet. App. 22a. The court acknowledged that the government "has several legitimate reasons for investigating its contractors," *id.* at 24a, and that Form 42's request for "'*any* adverse information about this person's employment, residence, or activities' may solicit some information relevant to the applicant's identity or security risk," *id.* at 25a. But the court characterized Form 42's questions as "broad" and "open-ended," and found it "difficult to see how" these questions were narrowly tailored to justify the government's interests in conducting background checks of contract employees having access to federal facilities, particularly those persons categorized as low risk. *Id.* at 24a-25a.

6. The government filed a second petition for rehearing en banc, which was denied. Judge Wardlaw issued an opinion concurring in the denial of rehearing en banc, Pet. App. 76a-95a, expressing the view that the court should await "a fully developed factual record" before reviewing the legal issues further, *id.* at 91a-92a, and that the "provocative questions" raised by other judges about the court's privacy doctrine only "underscore[] [the] panel's conclusions that serious questions were raised justifying the preliminary injunction," *id.* at 92a.

A total of five judges joined three published dissents from denial of rehearing en banc. Pet. App. 96a-130a. Judge Callahan's dissent (*id.* at 96a-120a) regarded the panel's opinion as "an unprecedented expansion of the constitutional right to informational privacy" that "reaches well beyond this case and may undermine personnel background investigations performed daily by federal, state, and local governments." *Id.* at 97a (Callahan, J., joined by Kleinfeld, Tallman, and Bea, JJ.). She noted that the panel's decision "sets our circuit apart from the District of Columbia Circuit and the Fifth Circuit, both of which have rejected privacy-based challenges to background checks similar to, or more intrusive than, the one here." *Id.* at 98a (citing *AFGE* v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997), and *NTEU* v. *United States Dep't of Treasury*, 25 F.3d 237 (5th Cir. 1994)). Judge Callahan also expressed the view that the practical result of the panel's decision is to "sharply curtail[] the degree to which the government can protect the safety and security of federal facilities." *Id.* at 120a.

Judge Kleinfeld's dissent (Pet. App. 120a-124a) focused on Form 42, stating that the panel's opinion calls into question the most basic investigation of an applicant

by a prospective employer, such as when a federal judge about to "hire law clerks and secretaries * * * talk[s] to professors and past employers and ask[s] some general questions about what they are like." *Id.* at 124a (Kleinfeld, J., joined by Callahan and Bea, JJ.). He explained that the references and landlords the applicant lists on SF-85 are highly likely to have information relevant to job fitness, and without some "open-ended questions, it is hard to know what potential problems might need an explanation." *Id.* at 122a-124a. Judge Kleinfeld expressed concern that, as a result of the panel's decision, NASA "cannot exercise the reasonable care an espresso stand or clothing store exercises when hiring" its employees. *Id.* at 124a.

Chief Judge Kozinski raised questions about the nature and scope of a constitutional right to informational privacy, particularly a right to prevent collection of information, as distinguished from its disclosure. Pet. App. 125a-130a (Kozinski, C.J., joined by Kleinfeld and Bea, JJ.). He observed that this Court had "hinted" at a constitutional right to informational privacy in two cases in the 1970s and then "never said another word about it." *Id.* at 125a (citing *Whalen* v. *Roe*, 429 U.S. 589 (1977), and *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977)). As a result, he observed, the courts of appeals "have been left to develop the contours of this free-floating privacy guarantee on their own," which he believed had resulted in the Ninth Circuit in "a grab-bag of cases on specific issues" without any "theory as to what this right (if it exists) is all about." *Ibid.*

Chief Judge Kozinski pointed to a number of distinctions that he believed would be important in defining such a right: between collection and disclosure of information, Pet. App. 125a-126a; between situations in which

a person cannot avoid the government's collection of information and cases in which the applicant can do so by seeking other employment, *id.* at 126a-127a; between information "pertain[ing] to a fundamental right, such as the right to an abortion or contraception," and "a free-standing right not to have the world know bad things about you," *id.* at 127a-128a; between collection of information from private files and collection of information from third parties, *id.* at 128a; and between the government's "functions as enforcer of the laws and as employer," *id.* at 128a-129a. Chief Judge Kozinski criticized the panel for failing to address those distinctions and characterized Ninth Circuit law as "so subjective and amorphous" that it cannot reliably be applied to new factual situations. *Id.* at 129a-130a.

REASONS FOR GRANTING THE PETITION

The court of appeals has directed the entry of a preliminary injunction exempting respondents—who are contract employees working at an important federal facility—from routine background checks of the sort that are performed hundreds of thousands of times each year for federal employees. That ruling is wrong and warrants this Court's review.

There is no need in this case to determine the scope of a constitutionally-based right to privacy for certain information or the range of governmental actions that may impermissibly interfere with such a right. Here, respondents' facial challenge to the inquiries in the background-check process is foreclosed in light of the reduced expectations of privacy in the employment context, the longstanding and widespread use of SF-85 and Form 42, and the Privacy Act's protections regarding the maintenance and dissemination of the information.

The ramifications of the decision below are potentially dramatic. The decision prevents the routine background checks of many government contract employees and it casts a constitutional cloud over the background-check process the government has used for federal civil service employees for over 50 years. The decision also is in substantial tension with decisions of the Fifth and D.C. Circuits. Those courts have upheld against privacy-based challenges background investigations that are similar to or more intrusive than the process at issue here. This Court's review is therefore warranted.

I. THE COURT OF APPEALS DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION WITHOUT GIVING DUE REGARD TO THIS COURT'S PRECEDENTS

The court of appeals has held that the Constitution requires the entry of a preliminary injunction to prevent the government from undertaking routine background checks of respondents to determine their suitability for credentials to enter federal facilities. The court's decision goes well beyond any decision of this Court, has no sound legal basis, and threatens substantial interference with important governmental functions.

1. This Court has issued two decisions discussing a constitutional right to prevent disclosure of certain information. The primary case concerning this question is *Whalen* v. *Roe*, 429 U.S. 589 (1977). In that case, the Court rejected a constitutional challenge to a state statute requiring doctors to disclose to a state agency, for maintenance in a database, the identity of persons who received certain prescription narcotics. *Id.* at 600-602. The Court observed that "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests": "the individual

interest in avoiding disclosure of personal matters," and "the interest in independence in making certain kinds of important decisions." *Id.* at 598-600. The Court then determined that the state statute did not pose a sufficiently grievous threat to either interest to establish a constitutional violation. *Id.* at 600, 604. With respect to the interest in avoiding disclosure, the Court noted that disclosures of private medical information to hospitals, insurers, and state agencies "are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient." *Id.* at 602. The Court also stressed that the state statute prohibited public disclosure of the information reported to the state agency, *id.* at 594-595, 601, observing that the government collects and uses data of a personal character for a wide variety of purposes, and that its right to do so is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosure, *id.* at 605. The Court recognized that "in some circumstances that duty arguably has its roots in the Constitution," but concluded that even were that so in *Whalen*, the statutory scheme and implementing regulations "evidence a proper concern with, and protection of, the individual's interest in privacy." *Ibid.*

The other decision in which this Court addressed a claim of constitutionally protected privacy interests in personal information is *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). In that case, the Court rejected a variety of challenges to the Presidential Recordings and Materials Preservation Act authorizing the collection and archiving of Presidential papers. As relevant here, the Court, relying on *Whalen*, rejected the claim that the mere screening of the former President's private materials by government archivists

violated his constitutional right to privacy. *Id.* at 455-465. The Court explained that *Whalen* had "[e]mphasiz[ed] the precautions utilized by New York State to prevent the unwarranted disclosure of private medical information retained in a state computer bank system," and concluded that the Presidential records act mandated regulations similarly aimed at preventing undue dissemination of private material. *Id.* at 458.

2. Without citing either of these decisions, the Ninth Circuit in this case suggested that "the right to informational privacy" encompasses any information that "is not generally disclosed by individuals to the public," Pet. App. 22a (internal quotation marks omitted), even when sought by the federal government from a contract employee and third parties for purposes of making employment-related decisions. In stating this holding, the court of appeals did not define with any particularity what information counts as sufficiently "private," and in what contexts, to outweigh the governmental interest in obtaining the information for specified purposes. See *id.* at 122a-123a (Kleinfeld, J., dissenting from denial of rehearing en banc). The court simply described the relevant inquiry as a balancing of "the government's interest in having or using the information against the individual's interest in denying access," provided a non-exclusive list of factors that are potentially relevant, and determined that under this test respondents had raised serious constitutional concerns about critical aspects of the government's most commonly used employment forms. *Ibid.* (quoting *Doe* v. *Attorney Gen. of the United States*, 941 F.2d 780, 796 (9th Cir. 1991)).

3. a. In enjoining the background-check process, the court of appeals ignored the guidance that this Court provided in *Whalen* and *Nixon* for assessing a constitu-

tional claim to informational privacy. Both *Whalen* and *Nixon* distinguished between the government's collection of information and its dissemination of information to the public, indicating that the latter presents more serious constitutional concerns than the former. See *Nixon*, 433 U.S. at 456-457; *Whalen*, 429 U.S. at 600-601. Yet the court of appeals indicated that it would apply the same balancing test any time the "government's actions compel disclosure of private information," regardless of whether the information is provided to the government for its own limited use or instead is disseminated publicly. Pet. App. 17a-18a.

Of particular significance, both *Whalen* and *Nixon* determined that any privacy concerns with respect to the information in question were met by statutory and regulatory protections limiting the public dissemination of the information. *Nixon*, 433 U.S. at 458-460; *Whalen*, 429 U.S. at 601-602. In this case, those protections include the Privacy Act, which requires, *inter alia*, that a federal agency that has a system of records maintain in those records only such information about an individual as is "relevant and necessary" to accomplish a purpose required by statute or executive order of the President, 5 U.S.C. 552a(e)(1), grants individuals a right of access to and correction of their records, 5 U.S.C. 552a(d), and strictly regulates any disclosures, 5 U.S.C. 552a(b). In addition, specific privacy requirements adopted by the Department of Commerce in its credentialing standard, *FIPS 201-1*, supplement the Privacy Act protections in this context. Pet. App. 117a-118a (Callahan, J., dissenting from denial of rehearing en banc). Yet the court of appeals gave short shrift to the statutory and regulatory provisions that prevent public dissemination of information collected during background checks. *Id.* at 23a-24a.

Indeed, the court did not even mention the Privacy Act, although SF-85 expressly notes that important source of protection. *Id.* at 138a; see *id.* at 117a-118a (Callahan, J., dissenting from denial of rehearing en banc). And the court directed entry of an injunction barring use of the forms, even though *Whalen* made clear that "the remote possibility" that existing safeguards "will provide inadequate protection against unwarranted disclosures" is "surely not a sufficient reason for invalidating the entire" information-collection program. 429 U.S. at 601-602.

b. The court of appeals erred in several other respects as well. The court did not distinguish between "disclosures that the target may refuse"—such as those made or authorized by a person seeking federal employment or access to federal facilities—and "those imposed regardless of his consent," even though the latter is "inherently more invasive." Pet. App. 126a-127a (Kozinski, C.J., dissenting from denial of rehearing en banc). The court also apparently assumed that the informational privacy right would apply to any information that is not generally disclosed to the public, *id.* at 22a, regardless of whether that information pertained to an independently recognized private sphere, such as "marriage, procreation, contraception, family relationships, child rearing, and education," *Washington* v. *Glucksberg*, 521 U.S. 702, 726 (1997), or concerned matters that are comparably sensitive.

Further, the court applied its standard equally to information obtained from the applicant himself and information obtained from third parties. Pet. App. 17a-18a, 22a n.5. As Judge Callahan noted, prior to the decision below, no court had held "that individuals have a constitutionally protected right to privacy in information

disclosed to [third parties]." *Id.* at 107a. That is unsurprising, because this Court has often recognized in the Fourth Amendment context that an individual does not have a reasonable expectation of privacy in information he voluntarily reveals to a third party, who subsequently conveys that information to the government. See, *e.g.*, *Smith* v. *Maryland*, 442 U.S. 735, 743-744 (1979); *United States* v. *Miller*, 425 U.S. 435, 443 (1976). The court of appeals responded to that longstanding Fourth Amendment precedent by stating that the inquiry in the context of a claim to informational privacy is different and should turn on "the *nature* of the information sought—in particular, whether it is sufficiently 'personal' to merit protection—rather than on the manner in which the information is sought." Pet. App. 22a n.5 (internal citation omitted). But an individual's prior disclosure of information to third parties (such as employers, landlords, or educational institutions)—or the third parties' acquisition of such information in the ordinary course of their business—may be highly relevant in assessing a constitutional claim relating to informational privacy. That is especially true when the information sought is employment-related, and the persons contacted are former employers, landlords, or other references whom the applicant identified as part of a process to determine his suitability for employment or access to federal facilities and information systems.

Finally, and relatedly, the court did not distinguish between the government's interests as a regulator and its interests as an employer. Pet. App. 129a (Kozinski, C.J., dissenting from denial of rehearing en banc); see *id.* at 110a-111a (Callahan, J., dissenting from denial of rehearing en banc). See *Engquist* v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2152 (2008) (courts should "con-

sider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer"). In particular, the court essentially ignored the widespread and accepted use of SF-85 and Form 42 in determining the suitability of individuals for federal employment—a practice so entrenched as itself to rebut the notion that the inquiries on these forms unconstitutionally intrude upon privacy interests.

4. The court of appeals also erred in finding the challenged inquiries to be insufficiently "tailored" to the important governmental interests underlying them. Contrary to the court's suggestion (Pet. App. 22a, 24a-25a), the inquiries seek only job-related information. SF-85 requests information about illegal drug use and related counseling because they are relevant to the government's decision whether an applicant is sufficiently trustworthy to gain access to federal facilities and information systems as a contract employee. See *id.* at 138a (SF-85 seeks information "for the purpose of determining your suitability for Federal employment"). The court of appeals acknowledged that the government has an interest in asking about recent drug use, *id.* at 21a, but decided that no such interest exists in seeking information about drug counseling or other treatment, because such treatment "presumably would *lessen* the government's concerns regarding the underlying activity." *Id.* at 22a. But that is the very reason for asking about counseling and treatment. Just as recent drug usage raises legitimate concerns about government credentialing, so too does recent, successful drug therapy mitigate those concerns. Thus, counseling and treatment, no less than use, are relevant to the government's decision

about an individual's suitability for employment or access to federal facilities.

Form 42's questions likewise are limited to matters bearing on suitability for federal employment, including contract employment. As the court of appeals recognized, "NASA has an interest in verifying its contractors' identities to make sure that they are who they say they are" and investigating them to "ensure[] the security of the JPL facility so as not to jeopardize the costly investments housed therein." Pet. App. 24a. The court held that this interest is insufficient because "there are no safeguards in place to limit the disclosures to information relevant to these purposes." *Id.* at 25a. But that conclusion is belied by Form 42 itself. The form states at the outset that its purpose is "to help [the government] determine [the applicant's] suitability for employment or security clearance." *Id.* at 145a. And even the question on the form most subject to the court of appeals' characterization as "open-ended" specifically limits the response requested to information that the recipient feels "may have a bearing on this person's suitability for government employment or a security clearance." *Id.* at 146a. Equally important, to the extent that this or other questions raise a concern about the information that might be received in a particular case, the Privacy Act ensures that an agency will maintain such information only if it is "relevant" to an agency function, and the Act affords an individual a right of access to his records and the opportunity to seek an amendment of them. 5 U.S.C. 552a(d), (e)(1) and (f). The court of appeals disregarded these important limitations and protections.

5. Recognition of a constitutional right to informational privacy that restricts the government's solicitation of basic employment-related information has poten-

tially far-reaching consequences. First, the court's decision finds likely constitutional violations in key aspects of the background-check process that is used for a significant portion of the 57,000 contract employees working at NASA facilities. Pet. App. 102a (Callahan, J., dissenting from denial of rehearing en banc). The President issued *HSPD-12* in response to concerns that arose after September 11, 2001, about individuals gaining access to federal facilities through identification fraud, and the Department of Commerce and NASA determined that an important way to ensure the security of federal facilities is to require federal contract employees working at those facilities to undergo the NACI process. Pet. App. 100a-101a (Callahan, J., dissenting from denial of rehearing en banc). The court of appeals' decision overrides that considered judgment by the agencies about the proper way to comply with the President's directive to ensure the security of federal facilities and information systems. Those security concerns are particularly significant with respect to JPL, a multi-billion-dollar facility that houses "some of the most sensitive and expensive equipment owned by NASA." *Id.* at 96a (Callahan, J., dissenting from denial of rehearing en banc).

The decision below also casts a constitutional cloud on the background-check process that has been required for federal civil service employees for over 50 years. Although the judge who authored the panel's decision suggested, on denial of rehearing, that the government could "continue reasonable reference checks" and "even * * * utilize Form 42" when the government has a "sufficiently great" justification and "adheres to proper limiting standards," Pet. App. 85a (Wardlaw, J., concurring in denial of rehearing en banc), the panel's decision provides little guidance as to what would be "reason-

able," "sufficient[]," or "proper." Worse yet, that substantial uncertainty may have effects beyond the Ninth Circuit, because the federal government promulgates standard forms and procedures on a nationwide basis.

Finally, the court of appeals' ruling calls into question even the most basic inquiries, beyond the forms used here, that public employers undertake for prospective employees. The federal government, like any other prospective employer, commonly solicits information from former employers and other references. In this process, government officials often ask general questions about the candidate's fitness, because they think that these questions may uncover information that narrowly focused inquiries have failed to produce. Yet the court of appeals' decision, in its hostility to "broad" and "open-ended" questions, Pet. App. 24a-25a, casts constitutional doubt on such general requests. Indeed, the decision's analysis appears to render suspect the most commonplace reference checks conducted by employers, such as when judges "hir[ing] law clerks and secretaries * * * talk[] to professors and past employers and ask[] some general questions about what they are like." *Id.* at 124a (Kleinfeld, J., dissenting from denial of rehearing en banc). Those potentially far-reaching consequences of the court of appeals' decision warrant this Court's consideration.

II. THE DECISION BELOW DIVERGES FROM DECISIONS OF OTHER CIRCUITS UPHOLDING SIMILAR BACKGROUND CHECKS

The Ninth Circuit's decision stands in stark contrast to decisions of other courts of appeals that have rejected privacy-based challenges to background checks for federal civil service employees.

1. In *AFGE* v. *HUD*, 118 F.3d 786, 794 (1997), the D.C. Circuit rejected constitutional and statutory challenges to particular portions of SF-85P, a form required for employees in public trust positions, and SF-86, a form required for employees who are in national security positions or who have access to classified information. *Id.* at 788-790. The employees challenged, *inter alia*, questions concerning prior illegal activity, drug use, and bankruptcies; delinquent financial obligations; and mental health treatment. *Ibid.* The employees also challenged the forms' authorization for federal investigators to contact individuals identified on the form. *Ibid.* As relevant here, the court of appeals rejected those challenges without deciding whether the Constitution protected the information, because even assuming that it does, the government had "presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into their employees' privacy." *Id.* at 793.

The court explained that "the individual interest" in protecting private information "is significantly less important where the information is collected by the government but not disseminated publicly." *AFGE*, 118 F.3d at 793. That is especially true, the court stated, where "there are measures designed to protect the confidentiality of" the information collected, such as the Privacy Act. *Ibid.* The court then determined that the government's interests in hiring trustworthy employees and protecting national security are sufficient to justify each of the challenged questions, and that the forms' authorization for contacting third parties is supported by the government's need to verify the information provided by the applicant that is relevant to job suitability. *Id.* at 793-794.

The Fifth Circuit rejected a similar challenge to SF-85P in *NTEU* v. *United States Department of the Treasury*, 25 F.3d 237 (1994). In that case, a union challenged the request for information about illegal drug use within the past five years and its follow-up request for information about "any treatment or counseling received." *Id.* at 239-240. The court of appeals rejected that challenge on standing grounds because the employees "ha[d] no reasonable expectation that they can keep [this information] confidential from their government employer." *Id.* at 244. The court explained that an important public interest in ensuring the trustworthiness of employees supports collecting the information at issue. *Id.* at 243-244. And, like the D.C. Circuit, the Fifth Circuit emphasized that the information collected was disclosed only to the government, in its role as an employer, "and certainly not to the public." *Id.* at 244.

2. The decision below diverges from the decisions of the Fifth and D.C. Circuits. See Pet. App. 98a, 116a, 120a (Callahan, J., dissenting from denial of rehearing en banc). Although the Fifth and D.C. Circuits considered the use of SF-85P and SF-86 for employees in public trust and national security positions, rather than the use of SF-85 for other employees, the questions posed on all three forms are similar. The drug and counseling questions challenged in this case directly parallel those at issue in *AFGE* and *NTEU*. Compare pp. 3-6, *supra*, with *AFGE*, 118 F.3d at 788, 790, and *NTEU*, 25 F.3d at 239-240. Further, all three forms conclude with a release that authorizes federal officials to contact third parties to inquire about the applicant's suitability for employment. Pet. App. 144a; *AFGE*, 118 F.3d at 789-790.

In considering the legality of these forms, the Ninth Circuit held that the government has no legitimate interest in seeking information from federal contract employees about treatment for illegal drug use and discredited the government's interest in seeking information from third parties about the contract employees' suitability for access to federal facilities. See Pet. App. 22a (drug treatment question); *id.* at 23a, 25a, 26a (Form 42 inquiries). The Fifth and D.C. Circuits, however, determined that similar inquiries were supported by important governmental interests, including hiring trustworthy employees and ensuring facility and information-system security. See *AFGE*, 118 F.3d at 793-794; *NTEU*, 25 F.3d at 243-244. Perhaps most fundamentally, the Ninth Circuit, unlike the other courts to have addressed similar issues, essentially disregarded the considered judgment of the Department of Commerce and NASA about how best to promote those interests, showing not the slightest reluctance to intrude on the actions of the Executive as an employer in a sensitive realm of operations.

Further, the Ninth Circuit's reasoning differs significantly from that used by the other circuits. The Ninth Circuit's analysis fails to distinguish between the collection of information by the government and the disclosure of that information to the public, and largely disregards the safeguards protecting against public disclosure. See Pet. App. 17a-18a. The Fifth and D.C. Circuits, by contrast, found a crucial difference between the government's collection of employment-related data and the dissemination of such data to the public, and the D.C. Circuit expressly relied on the Privacy Act as an important mechanism for preventing public disclosure. *AFGE*, 118 F.3d at 793; *NTEU*, 25 F.3d at 244. See also

Walls v. *City of Petersburg*, 895 F.2d 188, 194 (4th Cir. 1990) (stressing the importance of such protections); *Fraternal Order of Police* v. *City of Philadelphia*, 812 F.2d 105, 117-118 (3d Cir. 1987) (same).

3. The procedural context here does not diminish the need for the Court to resolve these disagreements. The court of appeals' ruling arises in the context of a request for a preliminary injunction. But contrary to the suggestion of the concurrence in the denial of rehearing en banc (see Pet. App. 91a-92a), an expanded record is not necessary for this Court's review because the Ninth Circuit's decision rests on legal errors. The question before the court of appeals and before this Court is whether the Constitution precludes the government from asking certain questions on the face of SF-85 and Form 42. That is an issue of law to be decided under this Court's decision in *Whalen*. The validity of the questions should be sustained under *Whalen* based on the nature of the questions on SF-85 and Form 42, the persons to whom the questions are directed, the widespread and longstanding use of the forms in federal employment, and the Privacy Act's restrictions on the maintenance and disclosure of personal information.

As noted, the Ninth Circuit has already rejected the rationale for the drug counseling question posed in SF-85 and has explicitly doubted that Form 42 is adequately tailored to survive constitutional scrutiny. And the fundamentally flawed mode of analysis adopted in the decision—including its failure to distinguish between the collection and dissemination of information, its discounting of statutory provisions and regulations designed to prevent dissemination, and its treatment of information in the hands of third parties as entitled to significant privacy protection—is now binding circuit law. The dis-

trict court on remand and other courts in the Ninth Circuit will not be free to re-examine these mistaken legal premises. Given the widespread use of the forms at issue here, and the routine nature of the employment-based inquiries such forms exemplify, the Ninth Circuit's decision, as it stands, therefore threatens significant interference with government operations. This Court should grant review now to remove the constitutional shadow the Ninth Circuit has cast on heretofore widely accepted employment-related practices of the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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No.

In the Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

		Page
Appendix A	— Court of appeals order and opinion (June 20, 2008)	1a
Appendix B	— Court of appeals opinion (Jan. 11, 2008)	30a
Appendix C	— Court of appeals order (Oct. 11, 2007)	50a
Appendix D	— District court order denying plaintiffs' motion for preliminary injunction (Oct. 3, 2007)	54a
Appendix E	— Court of appeals order denying rehearing en banc (June 4, 2009)	75a
Appendix F	— Statutory provisions	131a
Appendix G	— Forms	137a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56424

ROBERT M. NELSON; WILLIAM BRUCE BANERDT; JULIA BELL; JOSETTE BELLAN; DENNIS V. BYRNES; GEORGE CARLISLE; KENT ROBERT CROSSIN; LARRY R. D'ADDARIO; RILEY M. DUREN; PETER R. EISENHARDT; SUSAN D.J. FOSTER; MATTHEW P. GOLOMBEK; VAROUJAN GORJIAN; ZAREH GORJIAN; ROBERT J. HAW; JAMES KULLECK; SHARLON L. LAUBACH; CHRISTIAN A. LINDENSMITH; AMANDA MAINZER; SCOTT MAXWELL; TIMOTHY P. MCELRATH; SUSAN PARADISE; KONSTANTIN PENANEN; CELESTE M. SATTER; PETER M.B. SHAMES; AMY SNYDER HALE; WILLIAM JOHN WALKER; PAUL R. WEISSMAN, PLAINTIFFS-APPELLANTS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; CALIFORNIA INSTITUTE OF TECHNOLOGY, DEFENDANTS-APPELLEES

Argued and Submitted: Dec. 5, 2007
Filed: June 20, 2008

Before: DAVID R. THOMPSON and KIM MCLANE WARDLAW, Circuit Judges, and EDWARD C. REED, JR.,* District Judge.

ORDER

Our prior opinion filed on January 11, 2008, and reported at 512 F.3d 1134 is vacated concurrent with the filing of a new opinion today.

The petition for panel rehearing and the petition for rehearing en banc are denied as moot. The parties may file new petitions for rehearing and rehearing en banc in accordance with the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

OPINION

WARDLAW, Circuit Judge:

The named appellants in this action ("Appellants") are scientists, engineers, and administrative support personnel at the Jet Propulsion Laboratory ("JPL"), a research laboratory run jointly by the National Aeronautics and Space Administration ("NASA") and the California Institute of Technology ("Caltech"). Appellants sued NASA, Caltech, and the Department of Commerce (collectively "Appellees"), challenging NASA's re-

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* The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

cently adopted requirement that "low risk" contract employees like themselves submit to in-depth background investigations. The district court denied Appellants' request for a preliminary injunction, finding they were unlikely to succeed on the merits and unable to demonstrate irreparable harm. Because Appellants raise serious legal and constitutional questions and because the balance of hardships tips sharply in their favor, we reverse and remand.

I

JPL is located on federally owned land, but operated entirely by Caltech pursuant to a contract with NASA. Like all JPL personnel, Appellants are employed by Caltech, not the government. Appellants are designated by the government as "low risk" contract employees. They do not work with classified material.

Appellants contest NASA's newly instated procedures requiring "low risk" JPL personnel to yield to broad background investigations as a condition of retaining access to JPL's facilities. NASA's new policy requires that every JPL employee undergo a National Agency Check with Inquiries (NACI), the same background investigation required of government civil service employees, before he or she can obtain an identification badge needed for access to JPL's facilities. The NACI investigation requires the applicant to complete and submit Standard Form 85 (SF 85), which asks for (1) background information, including residential, educational, employment, and military histories; (2) the names of three references that "know you well;" and (3) disclosure of any illegal drug use, possession, supply, or manufacture within the past year, along with the nature

and circumstances of any such activities and any treatment or counseling received. This information is then checked against four government databases: (1) Security/Suitability Investigations Index; (2) the Defense Clearance and Investigation Index; (3) the FBI Name Check; and (4) the FBI National Criminal History Fingerprint Check. Finally, SF 85 requires the applicant to sign an "Authorization for Release of Information" that authorizes the government to collect "any information relating to [his or her] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." The information sought "may include, but is not limited to, [the applicant's] academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information."[1] The record is vague as to the exact extent to and manner in which the government will seek this information, but it is undisputed that each of the applicants' references, employers, and landlords will be sent an "Investigative Request for Personal Information" (Form 42), which asks whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness" or has "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters." The recipient is asked to explain any adverse information noted on the form. Once the information has been collected, NASA and the federal Office of Personnel Man-

[1] The form also notes that "for some information, a separate specific release will be needed," but does not explain what types of information will require a separate release.

agement determine whether the employee is "suitable" for continued access to NASA's facilities, though the exact mechanics of this suitability determination are in dispute.[2]

Since it was first created in 1958, NASA, like all other federal agencies, has conducted NACI investigations of its civil servant employees but not of its contract employees. Around the year 2000, however, NASA "determined that the incomplete screening of contractor employees posed a security vulnerability for the agency" and began to consider requiring NACI investigations for contract employees as well. In November 2005, revisions to NASA's Security Program Procedural Requirements imposed the same baseline NACI investigation for all employees, civil servant or contractor. These changes were not made applicable to JPL employees until January 29, 2007, when NASA modified its contract with Caltech to include the requirement. Caltech vigorously opposed the change, but NASA invoked its con-

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[2] Appellants claim that the factors used in the suitability determination were set forth in a document, temporarily posted on JPL's internal website, labeled the "Issue Characterization Chart." The document identifies within categories designated "A" through "D" "[i]nfrequent, irregular, but deliberate delinquency in meeting financial obligations," "[p]attern of irresponsibility as reflected in . . . credit history," "carnal knowledge," "sodomy," "incest," "abusive language," "unlawful assembly," "attitude," "homosexuality . . . when indications are present of possible susceptibility to coercion or blackmail," "physical health issues," "mental, emotional, psychological, or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation." NASA neither concedes nor denies that these factors are considered as part of its suitability analysis; instead, it suggests that Appellants have not sufficiently proved that such factors will play a role in any individual case.

tractual right to unilaterally modify the contract and directed Caltech to comply immediately with the modifications. Caltech subsequently adopted a policy—not required by NASA—that all JPL employees who did not successfully complete the NACI process so as to receive a federal identification badge would be deemed to have voluntarily resigned their Caltech employment.

On August 30, 2007, Appellants filed suit alleging, both individually and on behalf of the class of JPL employees in non-sensitive or "low risk" positions, that NASA's newly imposed background investigations are unlawful. Appellants bring three primary claims: (1) NASA and the Department of Commerce (collectively "Federal Appellees") violated the Administrative Procedure Act ("APA") by acting without statutory authority in imposing the investigations on contract employees; (2) the investigations constitute unreasonable searches prohibited by the Fourth Amendment; and (3) the investigations violate their constitutional right to informational privacy.

On September 24, 2007, Appellants moved for a preliminary injunction against the new policy on the basis that any JPL worker who failed to submit an SF 85 questionnaire by October 5, 2007, would be summarily terminated. The district court denied Appellants' request. It divided Appellants' claims into two categories—those challenging the SF 85 questionnaire itself and those challenging the grounds upon which an employee might be deemed unsuitable—and found that the challenges to the suitability determination were highly speculative and unripe for judicial review. The court rejected Appellants' APA claim, finding statutory support for the investigations in the National Aeronau-

tics and Space Act of 1958 (the "Space Act"), 42 U.S.C. § 2455(a). The court rejected Appellants' Fourth Amendment argument, holding that a background investigation was not a "search" within the meaning of the Fourth Amendment. Finally, the court found that the SF 85 questionnaire implicated the constitutional right to informational privacy but was narrowly tailored to further the government's legitimate security interest. After concluding that Appellants had little chance of success on the merits, the district court also found that they could not demonstrate irreparable injury because any unlawful denial of access to JPL's facilities could be remedied post hoc through compensatory relief.

On appeal, a motions panel of our court granted a temporary injunction pending a merits determination of the denial of the preliminary injunction. *Nelson v. NASA*, 506 F.3d 713 (9th Cir. 2007). The panel concluded that the information sought by SF 85 and its waiver requirement raised serious privacy issues and questioned whether it was narrowly tailored to meet the government's legitimate interest in ascertaining the identity of its low-risk employees. *Id.* at 716. The panel further found that "[t]he balance of hardships tips sharply in favor of [A]ppellants," who risk losing their jobs pending appeal, whereas there was no exigent reason for performing the NACI investigations during the few months pending appeal given that "it has been more than three years since the Presidential Directive [upon which the government relies] was issued." *Id.* at 716.

II

To obtain preliminary injunctive relief, Appellants must demonstrate either "(1) a likelihood of success on

the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999). The two prongs are not separate tests but rather "extremes of a single continuum," so "the greater the relative hardship to [the party seeking the preliminary injunction], the less probability of success must be shown." *Id.* (internal quotation marks omitted).

Upon review of the merits of the district court's denial of preliminary injunctive relief, we find ourselves in agreement with the motions panel. Appellants have demonstrated serious questions as to their informational privacy claim, and the balance of hardships tips sharply in their favor. We therefore conclude that the district court abused its discretion in denying Appellants' motion for a preliminary injunction, and we reverse and remand.

A. Standing and Ripeness

The district court found that the justiciability doctrines of ripeness and standing precluded consideration of Appellants' claims, except as they concerned the SF 85 questionnaire and associated waiver. We agree with the district court that Appellants' claims concerning the suitability determination are unripe and unfit for judicial review; however, the district court misconstrued Appellants' informational privacy claim, viewing it as limited to the SF 85 questionnaire alone.

To enforce Article III's limitation of federal jurisdiction to "cases and controversies," plaintiffs must demonstrate both standing and ripeness. To demonstrate standing, a plaintiff "must have suffered an 'injury in

fact'—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and quotation marks omitted). The ripeness doctrine similarly serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and requires assessing "'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779-80 (9th Cir. 2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)).

In analyzing justiciability, the district court distilled Appellants' claims into two basic arguments: (1) "that SF 85 is overly broad and intrusive considering the 'low-risk' nature of [appellants'] jobs at JPL" and (2) "that JPL's internal policy, which lists various grounds upon which an employee can be determined unsuitable for employment, is unconstitutional." We agree that challenges to the suitability determination are unripe because the record does not sufficiently establish how the government intends to determine "suitability"—accordingly, any claims are "strictly speculative." We also agree that Appellants have standing to challenge the SF 85 questionnaire, and because "it is undisputed that if [Appellants] do not sign the SF 85 waiver by October 5, 2007," they will "be deemed to have voluntarily resigned," there exists a "concrete injury that is imminent and not hypothetical" and thus ripe for review.

However, the district court overlooked Appellants' challenges to the government *investigation* that will result from the SF 85 requirement that the applicant sign an "authorization for release of information." On its face, this waiver authorizes the government to collect "*any* information . . . from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information" "includ[ing], but . . . not limited to, . . . academic, residential, performance, attendance, disciplinary, employment history, and criminal history record information." (emphasis added). It is uncontested that as a result of this authorization, the government Office of Personnel Management will send out "Investigative Request[s] for Personal Information," Form 42, to references, employers, and landlords. This form seeks highly personal information using an open-ended questioning technique, including asking for "any adverse information" at all or any "additional information which . . . may have a bearing on this person's suitability for government employment." Any harm that results from Form 42's dissemination and the information consequently provided to the government will be concrete and immediate.

Because Federal Appellees freely admit that Form 42 will be used in NASA's background investigations, Appellants have standing to challenge Form 42's distribution and solicitation of private information, and the issues raised in these challenges are ripe for review. The district court erred by excluding Form 42 claims from its analysis of Appellants' likelihood of success on the merits.

B. APA Claim

Appellants first claim that Federal Appellees violated the APA by imposing background investigations on contract employees without any basis in executive order or statute. The district court found that Congress gave NASA the authority to conduct such investigations in the Space Act of 1958, which provides:

> The [NASA] Administrator shall establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security. The Administrator may arrange with the Director of the Office of Personnel Management for the conduct of such security or other personnel investigations of the Administration's officers, employees, and consultants, and its contractors and subcontractors and their officers and employees, actual or prospective, as he deems appropriate. . . .

42 U.S.C. § 2455(a).

Appellants argue that the "security or other personnel investigations" described in the second sentence of § 2455(a) are examples of the "security requirements, restrictions, and safeguards" described in the first sentence and therefore may only be established "as . . . deem[ed] necessary in the interest of the national security." They then argue that this limiting clause must be read in light of *Cole v. Young*, 351 U.S. 536, 76 S. Ct. 861, 100 L. Ed. 1396 (1956), where the Supreme Court interpreted a statute giving certain government officials the power to summarily dismiss employees "when deemed necessary in the interest of the national security." *Id.* at 538, 76 S. Ct. 861 (internal quotation marks omitted). In *Cole*, the Court found it clear "that 'nation-

al security' was not used in the Act in an all-inclusive sense, but was intended to refer only to the protection of 'sensitive' activities" and therefore held that "an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a 'sensitive' position." *Id.* at 551, 76 S. Ct. 861. Appellants claim that, by using identical limiting language in the Space Act so soon after *Cole*, Congress intended to authorize personnel investigations only of contractors in "sensitive" positions and not of the "low risk" contractors at issue in this case.

We need not resolve whether the reference to the "interest of the national security" in § 2455(a) should be interpreted in light of *Cole*, because we read this limiting language to apply only to the "security requirements, restrictions, and safeguards" described in the first sentence and not to the "personnel investigations" described in the second sentence. The second sentence could plausibly be read as an example of the "security requirements, restrictions, and safeguards" described in the first sentence, but the statute's legislative history strongly suggests that it was instead meant to be a separate and distinct authorization of power. The Conference Report describes the two sentences separately and notes that the Senate version of the bill contained the second sentence but not the first. Conf. Rep. No. 2166 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3160, 3190, 3197-98. This suggests that § 2455(a) provides two distinct authorizations, the latter of which allows the NASA Administrator to arrange for "security and other personnel investigations" of contractors "as he deems appropriate," regardless of whether these investigations are "necessary in the interest of the national security." Because the Space Act appears to grant NASA the stat-

utory authority to require the investigations here at issue, we agree with the district court that Appellants are unlikely to succeed on the merits of their APA claim.[3]

C. Fourth Amendment Claim

We also agree with the district court's conclusion that Appellants are unlikely to succeed on their Fourth Amendment claims, because the government's actions are not likely to be deemed "searches" within the meaning of the Amendment. An action to uncover information is generally considered a "search" if the target of the search has a "reasonable expectation of privacy" in the information being sought, a term of art meaning a "subjective expectation of privacy . . . that society is prepared to recognize as reasonable." *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1151 (9th Cir. 2007) (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring)). One does not have a "reasonable expectation of privacy" in one's information for Fourth Amendment purposes merely because that information is of a "private" nature; instead, Fourth Amendment protection can evaporate in

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[3] To the extent that NASA has authority to require drug tests for current contractors, that authority is spelled out in the Civil Space Employee Testing Act, codified at 42 U.S.C. § 2473c. Congress enacted the Testing Act as part of the National Aeronautics & Space Administration Authorization Act, Fiscal Year 1992, and not as part of the Space Act of 1958. With the Testing Act, Congress gave NASA the power to administer a drug testing program for those employees or contractors responsible for "safety-sensitive, security, or national security functions." *Id.* § 2473c(c)(1)-(2). The "program shall provide for preemployment, reasonable suspicion, random, and post-accident testing for use . . . of alcohol or a controlled substance." *Id.* Moreover, the statute provides that any drug test "shall . . . provide for the confidentiality of test results and medical information of employees." *Id.* § 2473c(f)(7).

any of several ways. *See, e.g., United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (holding that there is no reasonable expectation of privacy in bank records in part because the information was voluntarily disclosed to the bank). To succeed on their Fourth Amendment claim, therefore, Appellants must demonstrate that either the Form 42 inquiries sent to third parties or the SF 85 questionnaire itself violates a "reasonable expectation of privacy" so as to be considered a "search" within the meaning of the Amendment.

1. **Form 42 Inquiries**

"What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection," *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); however, information does not lose Fourth Amendment protection simply because it is conveyed to another party. For example, in *Katz*, FBI agents attached an electronic listening device to the outside of a public telephone booth and recorded the defendant transmitting illegal betting information over the telephone. *Id.* at 348, 88 S. Ct. 507. Even though the booth's occupant had voluntarily conveyed the information in the conversation to the party on the other end of the line, the Court found that he was "surely entitled to assume that the words he utters into the mouthpiece w[ould] not be broadcast to the world," so the covert surveillance was considered a search within the meaning of the Amendment. *Id.* at 352-53, 88 S. Ct. 507.

On the other hand, in *United States v. White*, the Supreme Court held that the electronic surveillance of a conversation between a defendant and a government informant did *not* constitute a "search" for Fourth

Amendment purposes. 401 U.S. 745, 754, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (plurality). The Court acknowledged that, as in *Katz*, the speaker likely expected the content of the conversations to be kept private; however, it held as a bright-line rule that the Fourth Amendment "affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *Id.* at 749, 91 S. Ct. 1122 (quoting *Hoffa v. United States*, 385 U.S. 293, 302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966)). In *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), holding that the government could subpoena private bank records without implicating the Fourth Amendment, the Court extended the bright-line rule to all information knowingly revealed to the government by third parties:

> [T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 443, 96 S. Ct. 1619.

In the challenged background investigations, the government will send written Form 42 inquiries to the applicant's acquaintances. Through these inquiries, the third parties may disclose highly personal information about the applicant. As in *White* and *Miller*, the applicant presumably revealed this information to the third party with the understandable expectation that this information would be kept confidential. Nonetheless, these written inquiries appear to fit squarely under

Miller's bright-line rule and therefore cannot be considered "searches" under the Fourth Amendment.[4]

2. SF 85 Questionnaire

The SF 85 questionnaire required of the applicant is also unlikely to be considered a Fourth Amendment "search." Requiring an individual to answer questions may lead to the forced disclosure of information that he or she reasonably expects to keep private. Historically, however, when "the objective is to obtain testimonial rather than physical evidence, the relevant constitutional amendment is not the Fourth but the Fifth." *Greenawalt v. Ind. Dep't of Corr.*, 397 F.3d 587, 591 (7th Cir. 2005) (holding that a psychological examination required for continued government employment was not a search under the Fourth Amendment).

As Judge Posner notes in *Greenawalt*, direct questioning can potentially lead to a far greater invasion of privacy than many of the physical examinations that have in the past been considered Fourth Amendment "searches." *Id.* at 589-90. Nonetheless, applying the Fourth Amendment to such questioning would force the courts to analyze a wide range of novel contexts (e.g., courtroom testimony, police witness interviews, credit checks, and, as here, background checks) under a complex doctrine, with its cumbersome warrant and proba-

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[4] This analysis presupposes that the applicant voluntarily revealed the information to the third party. For example, the Fourth Amendment could still apply if the government actively used third parties to uncover private information. *See United States. v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (noting that the Fourth Amendment is implicated when "a private party acts as an 'instrument or agent' of the state in effecting a search or seizure.").

ble cause requirements and their myriad exceptions, that was designed with completely different circumstances in mind. *Id.* at 590-91. Moreover, declining to extend the Fourth Amendment to direct questioning will by no means leave individuals unprotected, as such contexts will remain governed by traditional Fifth and Sixth Amendment interrogation rights, and the right to informational privacy described below. *See id.* at 591-92.

Because neither the written inquiries directed at third parties nor the SF 85 questionnaire directed at the applicants will likely be deemed "searches," Appellants are unlikely to succeed on their Fourth Amendment claims.

D. Informational Privacy Claim

Although the district court correctly found that Appellants were unlikely to succeed on their APA and Fourth Amendment claims, it significantly underestimated the likelihood that Appellants would succeed on their informational privacy claim. These constitutional errors stem in large part from the court's erroneous ripeness ruling; by limiting its analysis to the SF 85 questionnaire, the court failed to consider the most problematic aspect of the government's investigation—the open-ended Form 42 inquiries.

We have repeatedly acknowledged that the Constitution protects an "individual interest in avoiding disclosure of personal matters." *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999). This interest covers a wide range of personal matters, including sexual activity, *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding that questioning police applicant about her prior sexual activity violated her right to informational privacy),

medical information, *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality."), and financial matters, *Crawford*, 194 F.3d at 958 (agreeing that public disclosure of social security numbers may implicate the right to informational privacy in "an era of rampant identity theft"). If the government's actions compel disclosure of private information, it "has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 959 (internal quotation marks omitted). We must "balance the government's interest in having or using the information against the individual's interest in denying access," *Doe v. Att'y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991), weighing, among other things:

> "the type of [information] requested, . . . the potential for harm in any subsequent nonconsensual disclosure, . . . the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access."

Id. (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)) (alteration in original).

Both the SF 85 questionnaire and the Form 42 written inquiries require the disclosure of personal information and each presents a ripe controversy. Therefore, whereas the district court limited its analysis to the SF 85 questionnaire, we consider the constitutionality of both aspects of the investigation in turn.

1. SF 85 Questionnaire

Appellants concede that most of the questions on the SF 85 form are unproblematic and do not implicate the constitutional right to informational privacy. They do however challenge the constitutionality of one group of questions concerning illegal drugs. The questionnaire asks the applicant:

> In the last year, have you used, possessed, supplied, or manufactured illegal drugs? . . . . If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs. Include any treatment or counseling received.

The form indicates that "[n]either your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding." The district court concluded that the requested information implicated the right to informational privacy, but found that there were "adequate safeguards in place [to deal with these] sensitive questions."

Other courts have been skeptical that questions concerning illegal drug use—much less possession, supply, or manufacture—would even implicate the right to informational privacy. For example, in *Mangels v. Pena*, 789 F.2d 836 (10th Cir. 1986), the Tenth Circuit held that the disclosure of firefighters' past illegal drug use did not violate their informational privacy rights. *Id.* at 839-40. The Court held that "[t]he possession of contraband drugs does not implicate any aspect of personal identity which, under prevailing precedent, is entitled to constitutional protection. . . . Validly enacted drug laws put

citizens on notice that this realm is not a private one." *Id.* at 839 (internal citations omitted). In *National Treasury Employees Union v. U.S. Department of Treasury*, 25 F.3d 237 (5th Cir. 1994), the Fifth Circuit considered a similar form to the SF 85 questionnaire, with almost identical questions concerning illegal drugs, and rejected the applicants' informational privacy claims. The Court raised similar concerns to the Tenth Circuit:

> Today's society has made the bold and unequivocal statement that illegal substance abuse will not be tolerated. The government declared an all-out war on illegal drugs more than a decade ago. . . . Surely anyone who works for the government has a diminished expectation that his drug and alcohol abuse history can be kept secret, given that he works for the very government that has declared war on substance abuse.

Id. at 243. The Court also noted that the plaintiffs in that case were all federal employees in either "High" or "Moderate" risk "public trust" positions, and were thus acutely "aware of [their] employer's elevated expectations in [their] integrity and performance." *Id.* at 244.

Like the Tenth and Fifth Circuits, we are sensitive to the government's interest in uncovering and addressing illegal substance abuse among its employees and contractors, given the public stance it has taken against such abuse. This government interest is undoubtedly relevant to the constitutional balancing inquiry: whether the forced disclosure "would advance a legitimate state interest and [is] narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 959. We are less convinced, however, that the government's interest should inform the threshold question of whether re-

quested information is sufficiently personal to invoke the constitutional right to privacy. We doubt that the government can strip personal information of constitutional protection simply by criminalizing the underlying conduct—instead, to force disclosure of personal information, the government must at least demonstrate that the disclosure furthers a legitimate state interest. Drug dependance and abuse carries an enormous stigma in our society and "is not generally disclosed by individuals to the public." *Id.* at 958. If we had to reach the issue, therefore, we would be inclined to agree with the district court that SF 85's drug questions reach sensitive issues that implicate the constitutional right to informational privacy.

We do not need to decide this issue, however, because even if the question requiring disclosure of prior drug use, possession, supply, and manufacture does implicate the privacy right, it is narrowly tailored to achieve the government's legitimate interest. As our sister circuits have lucidly explained, the federal government has taken a strong stance in its war on illegal drugs, and this stance would be significantly undermined if its own employees and contractors freely ignored its laws. By requiring applicants to disclose whether they have "used, possessed, supplied, or manufactured illegal drugs" within the past year, and, if so, to explain the "nature of the activity" and "any other details relating to [the applicant's] involvement with illegal drugs," the government has crafted a narrow inquiry designed to limit the disclosure of personal information to that which is necessary to further the government's legitimate interest.

The same cannot be said, however, for requiring applicants to disclose "any treatment or counseling received" for their drug problems. Information relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy. *See Norman-Bloodsaw*, 135 F.3d at 1269; *Doe*, 941 F.2d at 796. The government has not suggested any legitimate interest in requiring the disclosure of such information; indeed, any treatment or counseling received for illegal drug use would presumably *lessen* the government's concerns regarding the underlying activity. Because SF 85 appears to *compel* disclosure of personal medical information for which the government has failed to demonstrate a legitimate state interest, Appellants are likely to succeed on this—albeit narrow—portion of their informational privacy challenge to SF 85.

2. Form 42 Inquiries

The Form 42 written inquiries—omitted from the district court's analysis as a result of its erroneous ripeness holding—are much more problematic. Form 42 solicits "any adverse information" concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," and "other matters." These open-ended questions are designed to elicit a wide range of adverse, private information that "is not generally disclosed by individuals to the public" and therefore seemingly implicate the right to informational privacy. *Crawford*, 194 F.3d at 958.[5]

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[5] The constitutional right to informational privacy is concerned with "the individual interest in avoiding disclosure of personal matters." In determining whether the right applies, our cases have emphasized the

The government suggests that even if the information disclosed in the investigation implicates the right to informational privacy, the scheme must be upheld because the government has taken measures to keep the information from being disclosed to the general public. Although the risk of public disclosure is undoubtedly an important consideration in our analysis, *see Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002), it is only one of many factors that we should consider, *id.* at 789-90 ("[T]he right to 'informational privacy' . . . applies both when an individual chooses

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nature of the information sought—in particular, whether it is sufficiently "personal" to merit protection, *see Crawford*, 194 F.3d at 958; *Doe*, 941 F.2d at 796—rather than on the manner in which the information is sought. The highly personal information that the government seeks to uncover through the Form 42 inquiries is protected by the right to privacy, whether it is obtained from third parties or from the applicant directly.

In this respect, the right to informational privacy differs from the Fourth Amendment, which, as a bright-line rule, "does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *Miller*, 425 U.S. at 443, 96 S. Ct. 1619. This principle has occasionally been rephrased as a general holding "that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). We think it is clear, however, that the "legitimate expectation of privacy" described in this context is a term of art used only to define a "search" under the Fourth Amendment, and *Miller* and *Smith* do not preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters. If the constitutional right to informational privacy were limited to cases that involved a Fourth Amendment "search," the two rights would be entirely redundant. Indeed, although the two doctrines often overlap, *see Norman-Bloodsaw*, 135 F.3d at 1269, we have repeatedly found the right to informational privacy implicated in contexts that did not involve a Fourth Amendment "search," *see, e.g., Thorne*, 726 F.2d at 468.

not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public."); *Norman-Bloodsaw*, 135 F.3d at 1269 (noting that a government action can violate the right to privacy without disclosure to third parties); *Doe*, 941 F.2d at 796 (listing, as two factors among many, "'the potential for harm in any subsequent nonconsensual disclosure [and] the adequacy of safeguards to prevent authorized disclosure.'") (quoting *Westinghouse Elec. Corp.*, 638 F.2d at 578). Therefore, although safeguards exist to help prevent disclosure of the applicants' highly sensitive information, Federal Appellees must still demonstrate that the background investigations are justified by legitimate state interests and that Form 42's questions are "narrowly tailored to meet those legitimate interests." *Thorne*, 726 F.2d at 469.

We agree with the government that it has several legitimate reasons for investigating its contractors. NASA has an interest in verifying its contractors' identities to make sure that they are who they say they are, and it has an interest in ensuring the security of the JPL facility so as not to jeopardize the costly investments housed therein. Appellants concede, as they must, that these are legitimate government interests.

The government has failed to demonstrate, however, that Form 42's questions are "narrowly tailored" to meet these legitimate interests. Initially, we note that although NASA has a general interest in keeping the JPL facility secure, there is no specific evidence in the record to suggest that any of the "low risk" JPL personnel pose such a security risk; indeed, NASA appears to designate as "moderate risk" any individual who has the

"opportunity to cause damage to a significant NASA asset or influence the design or implementation [of] a security mechanism designed to protect a significant NASA asset." More importantly, Form 42's broad, open-ended questions appear to range far beyond the scope of the legitimate state interests that the government has proposed. Asking for "*any* adverse information about this person's employment, residence, or activities" may solicit some information relevant to the applicant's identity or security risk, but there are no safeguards in place to limit the disclosures to information relevant to these interests. Instead, the form invites the recipient to reveal *any* negative information of which he or she is aware. It is difficult to see how the vague solicitation of derogatory information concerning the applicant's "general behavior or conduct" and "other matters" could be narrowly tailored to meet *any* legitimate need, much less the specific interests that Federal Appellees have offered to justify the new requirement.

Finally, the context in which the written inquiries are posed further supports Appellants' claim. In *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), we focused not only on the private nature of questions asked, but also on the lack of standards governing the inquiry. We held that questioning a female police applicant about her past sexual relations with another officer in the department violated her constitutional right to informational privacy, *id.* at 468, finding that many of the questions posed went beyond any relevant lines of questioning, *id.* at 469-70. More importantly, we noted that the city had not set any *standards* for inquiring about the private information. *Id.* at 470. "When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational inter-

ests . . . , an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action." *Id.* In this case, the government's questions stem from SF 85's extremely broad authorization, allowing it "to obtain *any* information" from any source, subject to other releases being necessary only in some vague and unspecified contexts. Federal Appellees have steadfastly refused to provide any standards narrowly tailoring the investigations to the legitimate interests they offer as justification. Given that Form 42's open-ended and highly private questions are authorized by this broad, standardless waiver and do not appear narrowly tailored to any legitimate government interest, the district court erred in finding that Appellants were unlikely to succeed on their informational privacy claim.

E. Balance of Hardships

The balance of hardships tips sharply toward Appellants, who face a stark choice—either violation of their constitutional rights or loss of their jobs. The district court erroneously concluded that Appellants will not suffer any irreparable harm because they could be retroactively compensated for any temporary denial of employment. It is true that "monetary injury is not normally considered irreparable," *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980), and the JPL employees who choose to give up their jobs may later be made whole financially if the policy is struck down. However, in the meantime, there is a substantial risk that a number of employees will not be able to finance such a principled position and so will be coerced into submitting to the allegedly unconstitutional

NACI investigation. Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Moreover, the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.

On the other side of the balance, NASA has not demonstrated any specific harm that it will face if it is enjoined for the pendency of the adjudication from applying its broad investigatory scheme to "low risk" JPL contract employees, many of whom have worked at the laboratory for decades. As Caltech argues, JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958, so granting injunctive relief would make NASA no worse off than it has ever been. Moreover, an injunction in this case would not affect NASA's ability to investigate JPL personnel in "high risk" or "moderate risk" positions, significantly undercutting any lingering security fears. Finally, we note that NASA has taken years to implement NACI at JPL, a fact we construe as weakening any urgency in imposing the investigations before Appellants' claims are fully adjudicated on their merits.

III

Caltech separately argues that any injunctive relief should not encompass it because, as a private actor, it cannot be held liable for constitutional violations that arise from the government-imposed background investigations. Caltech is correct that there exists a "presumption that private conduct does not constitute government

action." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). This presumption is rebutted, however, when a sufficient nexus "make[s] it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some *willful participation in a joint activity* by the private entity and the government." *Id.* at 843 (emphasis added).

Caltech notes that it initially opposed the new background investigations, which are conducted entirely by NASA and other government agencies; therefore, it claims that the investigations are not "joint activities" and Caltech is not a "willful participant." We have some sympathy for this argument, and if Caltech had done nothing more than abide by the contract terms unilaterally imposed by NASA, we might agree with its position. Here, however, the record is clear that Caltech did do more—it established, on its own initiative, a policy that JPL employees who failed to obtain federal identification badges would not simply be denied access to JPL, they would be terminated entirely from Caltech's employment. This decision does not necessarily render Caltech liable as a governmental actor, but it raises serious questions as to whether the university has in fact now become a willful and joint participant in NASA's investigation program, even though it was not so initially. Caltech's threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights. Moreover, with the government enjoined, Caltech faces no independent harm to itself, so the balance of hardships tips overwhelmingly in Appellants' favor. Therefore, we hold that preliminary injunctive relief should apply both to Caltech and to Federal Appellees.

IV

Appellants have raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor. The district court's denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion. Accordingly, we reverse and remand with instructions to fashion preliminary injunctive relief consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56424

ROBERT M. NELSON; WILLIAM BRUCE BANERDT; JULIA BELL; JOSETTE BELLAN; DENNIS V. BYRNES; GEORGE CARLISLE; KENT ROBERT CROSSIN; LARRY R. D'ADDARIO; RILEY M. DUREN; PETER R. EISENHARDT; SUSAN D.J. FOSTER; MATTHEW P. GOLOMBEK; VAROUJAN GORJIAN; ZAREH GORJIAN; ROBERT J. HAW; JAMES KULLECK; SHARLON L. LAUBACH; CHRISTIAN A. LINDENSMITH; AMANDA MAINZER; SCOTT MAXWELL; TIMOTHY P. MCELRATH; SUSAN PARADISE; KONSTANTIN PENANEN; CELESTE M. SATTER; PETER M.B. SHAMES; AMY SNYDER HALE; WILLIAM JOHN WALKER; PAUL R. WEISSMAN, PLAINTIFFS-APPELLANTS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; CALIFORNIA INSTITUTE OF TECHNOLOGY, DEFENDANTS-APPELLEES

Argued and Submitted: Dec. 5, 2007
Filed: Jan. 11, 2008

Before: DAVID R. THOMPSON and KIM MCLANE WARDLAW, Circuit Judges, and EDWARD C. REED, JR.,* District Judge.

WARDLAW, Circuit Judge:

The named appellants in this action ("Appellants") are scientists, engineers, and administrative support personnel at the Jet Propulsion Laboratory ("JPL"), a research laboratory run jointly by the National Aeronautics and Space Administration ("NASA") and the California Institute of Technology ("Caltech"). Appellants sued NASA, Caltech, and the Department of Commerce (collectively "Appellees"), challenging NASA's recently adopted requirement that "low risk" contract employees like themselves submit to in-depth background investigations. The district court denied Appellants' request for a preliminary injunction, finding they were unlikely to succeed on the merits and unable to demonstrate irreparable harm. Because Appellants raise serious legal and constitutional questions and because the balance of hardships tips sharply in their favor, we reverse and remand.

I

JPL is located on federally owned land, but operated entirely by Caltech pursuant to a contract with NASA. Like all JPL personnel, Appellants are employed by

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* The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

Caltech, not the government. Appellants are designated by the government as "low risk" contract employees. They do not work with classified material.

Appellants contest NASA's newly instated procedures requiring "low risk" JPL personnel to yield to broad background investigations as a condition of retaining access to JPL's facilities. NASA's new policy requires that every JPL employee undergo a National Agency Check with Inquiries (NACI), the same background investigation required of government civil service employees, before he or she can obtain an identification badge needed for access to JPL's facilities. The NACI investigation requires the applicant to complete and submit Standard Form 85 (SF 85), which asks for (1) background information, including residential, educational, employment, and military histories, (2) the names of three references that "know you well," and (3) disclosure of any illegal drug use within the past year, along with any treatment or counseling received for such use. This information is then checked against four government databases: (1) Security/Suitability Investigations Index; (2) the Defense Clearance and Investigation Index; (3) the FBI Name Check; and (4) the FBI National Criminal History Fingerprint Check. Finally, SF 85 requires the applicant to sign an "Authorization for Release of Information" that authorizes the government to collect "any information relating to [his or her] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." The information sought "may include, but is not limited to, [the applicant's] academic, residential, achievement, performance, attendance, disciplinary, employment history,

and criminal history record information."[1] The record is vague as to the exact extent to and manner in which the government will seek this information, but it is undisputed that each of the applicants' references, employers, and landlords will be sent an "Investigative Request for Personal Information" (Form 42), which asks whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness" or has "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters." The recipient is asked to explain any adverse information noted on the form. Once the information has been collected, NASA and the federal Office of Personnel Management determine whether the employee is "suitable" for continued access to NASA's facilities, though the exact mechanics of this suitability determination are in dispute.[2]

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[1] The form also notes that "for some information, a separate specific release will be needed," but does not explain what types of information will require a separate release.

[2] Appellants claim that the factors used in the suitability determination were set forth in a document, temporarily posted on JPL's internal website, labeled the "Issue Characterization Chart." The document identifies within categories designated "A" through "D" "[i]nfrequent, irregular, but deliberate delinquency in meeting financial obligations," "[p]attern of irresponsibility as reflected in . . . credit history," "carnal knowledge," "sodomy," "incest," "abusive language," "unlawful assembly," "attitude," "homosexuality . . . when indications are present of possible susceptibility to coercion or blackmail," "physical health issues," "mental, emotional, psychological, or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation." NASA neither concedes nor denies that these factors are

Since it was first created in 1958, NASA, like all other federal agencies, has conducted NACI investigations of its civil servant employees but not of its contract employees. Around the year 2000, however, NASA "determined that the incomplete screening of contractor employees posed a security vulnerability for the agency" and began to consider requiring NACI investigations for contract employees as well. In November 2005, revisions to NASA's Security Program Procedural Requirements imposed the same baseline NACI investigation for all employees, civil servant or contractor. These changes were not made applicable to JPL employees until January 29, 2007, when NASA modified its contract with Caltech to include the requirement. Caltech vigorously opposed the change, but NASA invoked its contractual right to unilaterally modify the contract and directed Caltech to comply immediately with the modifications. Caltech subsequently adopted a policy—not required by NASA—that all JPL employees who did not successfully complete the NACI process so as to receive a federal identification badge would be deemed to have voluntarily resigned their Caltech employment.

On August 30, 2007, Appellants filed suit alleging, both individually and on behalf of the class of JPL employees in non-sensitive or "low risk" positions, that NASA's newly imposed background investigations are unlawful. Appellants bring three primary claims: (1) NASA and the Department of Commerce (collectively "Federal Appellees") violated the Administrative Procedure Act ("APA") by acting without statutory authority

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considered as part of its suitability analysis; instead, it suggests that Appellants have not sufficiently proved that such factors will play a role in any individual case.

in imposing the investigations on contract employees; (2) the investigations violate their constitutional right to informational privacy; and (3) the investigations constitute unreasonable searches prohibited by the Fourth Amendment.

On September 24, 2007, Appellants moved for a preliminary injunction against the new policy on the basis that any JPL worker who failed to submit an SF 85 questionnaire by October 5, 2007 would be summarily terminated. The district court denied Appellants' request. It divided Appellants' claims into two categories—those challenging the SF 85 questionnaire itself and those challenging the grounds upon which an employee might be deemed unsuitable—and found that the challenges to the suitability determination were highly speculative and unripe for judicial review. The court rejected Appellants' APA claim, finding statutory support for the investigations in the National Aeronautics and Space Act of 1958 (the "Space Act"), which allows NASA to establish security requirements as deemed "necessary in the interest of the national security." 42 U.S.C. § 2455(a). Limiting its review to the SF 85 questionnaire, the court found the form implicated the constitutional right to informational privacy but was narrowly tailored to further the government's legitimate security interest. Finally, the court rejected Appellants' Fourth Amendment argument, holding that a background investigation was not a "search" within the meaning of the Fourth Amendment. After concluding that Appellants had little chance of success on the merits, the district court also found that they could not demonstrate irreparable injury, because any unlawful denial of access from JPL could be remedied post hoc through compensatory relief.

On appeal, a motions panel of our court granted a temporary injunction pending a merits determination of the denial of the preliminary injunction. *Nelson v. NASA*, 506 F.3d 713 (9th Cir. 2007). The panel concluded that the information sought by SF 85 and its waiver requirement raised serious privacy issues and questioned whether it was narrowly tailored to meet the government's legitimate interest in ascertaining the identity of its low-risk employees. *Id.* at 716. The panel further found that "[t]he balance of hardships tips sharply in favor of [A]ppellants," who risk losing their jobs pending appeal, whereas there was no exigent reason for performing the NACI investigations during the few months pending appeal given that "it has been more than three years since the Presidential Directive [upon which the government relies] was issued." *Id.* at 716.

II

To obtain preliminary injunctive relief, Appellants must demonstrate either "(1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999). The two prongs are not separate tests but rather "extremes of a single continuum," so "the greater the relative hardship to [the party seeking the preliminary injunction], the less probability of success must be shown." *Id.* (internal quotation marks omitted).

Upon review of the merits of the district court's denial of preliminary injunctive relief, we find ourselves in agreement with the motions panel. Appellants have demonstrated serious questions as to certain of their

claims on which they are likely to succeed on the merits, and the balance of hardships tips sharply in their favor. We therefore conclude that the district court abused its discretion in denying Appellants' motion for a preliminary injunction, and we reverse and remand.

A. *Standing and Ripeness*

The district court found that the justiciability doctrines of ripeness and standing precluded consideration of Appellants' claims, except as they concerned the SF 85 questionnaire and associated waiver. We agree with the district court that Appellants' claims concerning the suitability determination are unripe and unfit for judicial review; however, the district court misconstrued Appellants' informational privacy claim, viewing it as limited to the SF 85 questionnaire alone.

To enforce Article III's limitation of federal jurisdiction to "cases and controversies," plaintiffs must demonstrate both standing and ripeness. To demonstrate standing, a plaintiff "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and quotation marks omitted). The ripeness doctrine similarly serves to "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and requires assessing "'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779-80 (9th Cir.

2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)).

In analyzing justiciability, the district court distilled Appellants' claims into two basic arguments: (1) "that SF 85 is overly broad and intrusive considering the 'low-risk' nature of [appellants'] jobs at JPL" and (2) "that JPL's internal policy, which lists various grounds upon which an employee can be determined unsuitable for employment, is unconstitutional." We agree that challenges to the suitability determination are unripe because the record does not sufficiently establish how the government intends to determine "suitability"—accordingly, any claims are "strictly speculative." We also agree that Appellants have standing to challenge the SF 85 questionnaire, and because "it is undisputed that if [Appellants] do not sign the SF 85 waiver by October 5, 2007," they will "be deemed to have voluntarily resigned," there exists a "concrete injury that is imminent and not hypothetical" and thus ripe for review.

However, the district court overlooked Appellants' challenges to the government *investigation* that will result from the SF 85 requirement that the applicant sign an "authorization for release of information." On its face, this waiver authorizes the government to collect "*any* information . . . from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information" "includ[ing], but . . . not limited to, . . . academic, residential, performance, attendance, disciplinary, employment history, and criminal history record information." It is uncontested that as a result of this authorization, the government Office of Personnel Management will send out "Investigative Request[s] for Per-

sonal Information," Form 42, to references, employers, and landlords. This form seeks highly personal information using an open-ended questioning technique, including asking for "any adverse information" at all or any "additional information which . . . may have a bearing on this person's suitability for government employment." Any harm that results from Form 42's dissemination and the information consequently provided to the government will be concrete and immediate.

Because Federal Appellees freely admit that Form 42 will be used in NASA's background investigations, Appellants have standing to challenge Form 42's distribution and solicitation of private information, and the issues raised in these challenges are ripe for review. The district court erred by excluding Form 42 claims from its analysis of Appellants' likelihood of success on the merits.

B. *APA Claims*

Appellants argue that Federal Appellees violated the APA by imposing background investigations on contract employees without any basis in executive order or statute. In response, Federal Appellees find authorization for their program in three statutory and regulatory sources: The Homeland Security Presidential Directive 12 ("HSPD 12"), the Federal Information Security Management Act ("FISMA"), and the Space Act.

Both HSPD 12 and FISMA fail on their face to authorize the broad background investigations NASA has imposed on JPL personnel. HSPD 12 creates a Federal policy of "establishing a mandatory Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and

contractors (including contractor employees)." However, many of the questions in SF 85 and Form 42 seek much more information than that which would securely and reliably identify the employees. *Nelson*, 506 F.3d at 716. Similarly, FISMA gives the Secretary of Commerce authority to "prescribe standards and guidelines pertaining to Federal information systems," 40 U.S.C. § 11331(a)(1) (2002), but NASA's NACI requirement is hardly limited to protecting "Federal information systems." Indeed, the background investigations are required of all JPL personnel, whether or not they have access to information systems, and therefore cannot be entirely justified, if at all, by FISMA. That neither HSPD 12 nor FISMA authorize NASA's actions is reinforced by Federal Appellees' own declarations that "the decision to require at a minimum a NACI for NASA contractor employees dates back to the 2000 to 2001 timeframe," well before either FISMA was passed in 2002 or HSPD 12 was issued in 2004.

The Space Act, at first glance, appears more promising; however, it too fails to justify requiring these open-ended investigations of "low-risk" contract employees. The Space Act authorizes the NASA Administrator to "establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security." 42 U.S.C. § 2455(a) (1958). The district court found that this language "clearly gives NASA the authority to implement background investigations as part of the security screening of contractors;" however, it ignored the statute's limiting language that the security programs established be "deem[ed] necessary in the interest of the national security." This phrase must be read in light of *Cole v. Young*, 351 U.S. 536, 76 S. Ct. 861, 100 L. Ed. 1396 (1956), decided just two years be-

fore the Space Act was passed. In *Cole*, the Supreme Court considered a statute that gave certain government officials the power to summarily dismiss employees "when deemed necessary in the interest of the national security." *Id.* at 538, 76 S. Ct. 861 (internal quotation marks omitted). The Court noted:

> While that term is not defined in the Act, we think it clear from the statute as a whole that that term was intended to comprehend only those activities of the Government that are directly concerned with the protections of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare.

Id. at 544, 76 S. Ct. 861. The Court found it clear "that 'national security' was not used in the Act in an all-inclusive sense, but was intended to refer only to the protection of 'sensitive' activities. It follows that an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a 'sensitive' position. . . ." *Id.* at 551, 76 S. Ct. 861. We agree with Appellants that the use of identical limiting language in the Space Act so soon after *Cole* was decided strongly suggests that Congress expected the term "national security" to be similarly construed in this context. Therefore, the Space Act's authorization to establish "security requirements, restrictions, and safeguards" applies to "only those activities of the Government that are directly concerned with the protections of the Nation from internal subversion or foreign aggression," *id.* at 544, 76 S. Ct. 861, and background investigations can be deemed "in the interest of the national security" "only if [the target of the investigation] occu-

pies a 'sensitive' position," *id.* at 551, 76 S. Ct. 861. Here, it is undisputed that the Appellants do not occupy "sensitive" positions; they are low-risk employees. Because the district court's reading of the Space Act failed to account for the Supreme Court's holding in *Cole*, its conclusion as to Appellants' likelihood of success as to their APA claim was erroneous.

C. *Informational Privacy Claims*

The district court similarly underestimated the likelihood that Appellants would succeed on their informational privacy claim. We have repeatedly acknowledged that the Constitution protects an "individual interest in avoiding disclosure of personal matters." *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999). This interest covers a wide range of personal matters, including sexual activity, *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding that questioning police applicant about her prior sexual activity violated her right to informational privacy), medical information, *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality"), and financial matters, *Crawford*, 194 F.3d at 958 (agreeing that public disclosure of social security numbers may implicate the right to informational privacy in "an era of rampant identity theft"). If the government's actions compel disclosure of private information, it "has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the

legitimate interest." *Crawford*, 194 F.3d at 959 (internal quotation marks omitted).

The district court correctly concluded that the requested information in this case is sufficiently private to implicate the right to informational privacy. SF 85 requires the applicant to disclose any illegal drug use within the past year, along with any treatment or counseling received. The Supreme Court has made clear, in the Fourth Amendment context, that individuals' reasonable expectations of privacy in their medical history includes information about drug use, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989), and, by analogy, drug treatment or counseling. Moreover, Form 42 inquiries distributed as part of the NACI—omitted from the district court's analysis as a result of its erroneous ripeness holding—are even more probing. Form 42 solicits "any adverse information" concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," and "other matters." These open-ended questions are designed to elicit a wide range of adverse, private information that "is not generally disclosed by individuals to the public," *Crawford*, 194 F.3d at 958; accordingly, they must be deemed to implicate the right to informational privacy.

Considering the breadth of Form 42's questions, it is difficult to see how they could be narrowly tailored to meet any legitimate need, much less the specific interests that Federal Appellees have offered to justify the new requirement. Asking for "*any* adverse information about this person's employment, residence, or activities" may solicit some information relevant to "identity," "national security," or "protecting federal information sys-

tems," but there are absolutely no safeguards in place to limit the disclosures to information relevant to these interests. Instead, the form invites the recipient to reveal *any* negative information of which he or she is aware. There is nothing "narrowly tailored" about such a broad inquisition.

Finally, the context in which the written inquiries are posed further supports Appellants' claim. In *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), we focused not only on the private nature of questions asked, but also on the lack of standards governing the inquiry. We held that questioning a female police applicant about her past sexual relations with another officer in the department violated her constitutional right to informational privacy, *id.* at 468, finding that many of the questions posed went beyond any relevant lines of questioning, *id.* at 469-70. More importantly, we noted that the city had not set any *standards* for inquiring about the private information. *Id.* at 470. "When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational interests . . . , an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action." *Id.* In this case, the government's questions stem from SF 85's extremely broad authorization, allowing it "to obtain *any* information" from any source, subject to other releases being necessary only in some vague and unspecified contexts. Federal Appellees have steadfastly refused to provide any standards narrowly tailoring the investigations to the legitimate interests they offer. Given that Form 42's open-ended and highly private questions are authorized by this broad, standardless waiver and do not appear narrowly

tailored to any legitimate government interest, the district court erred in finding that Appellants were unlikely to succeed on their informational privacy claim.

D. *Fourth Amendment Claims*

We agree with the district court's conclusion that Appellants are unlikely to succeed on their Fourth Amendment claims. The government's actions are not likely to be deemed "searches" within the meaning of the Fourth Amendment. An action to uncover information is considered a "search" if the target of the search has a "reasonable expectation of privacy" in the information being sought, meaning a "subjective expectation of privacy . . . that society is prepared to recognize as reasonable." *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1151 (9th Cir. 2007) (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring)). Under our Fourth Amendment jurisprudence, one does not have a reasonable expectation of privacy in one's information merely because that information is of a "private" nature; instead, such an otherwise reasonable expectation can evaporate in any of several ways. *See, e.g., United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (holding that there is no reasonable expectation of privacy in bank records because the information was voluntarily disclosed to the bank).

The Form 42 questionnaire sent to third parties cannot be considered a "search," because "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities. . . ." *Miller*, 425 U.S. at 443, 96 S. Ct. 1619. This principle has its roots in *Hoffa v.*

United States, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966), and *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), both of which dealt with the government's use of confidential informants and held that the Fourth Amendment "affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" *White*, 401 U.S. at 749, 91 S. Ct. 1122 (quoting *Hoffa*, 385 U.S. at 302, 87 S. Ct. 408). In *Miller*, the Supreme Court held that the Fourth Amendment did not protect subpoenaed bank records, seemingly extending the *Hoffa/White* principle to cover all information knowingly disclosed to the government by a third party. Under *Miller*, therefore, written inquiries sent to third parties, no matter how private the subject of their questioning, cannot be considered "searches."

Similarly, the questions posed directly to the applicant on the SF 85 questionnaire are also unlikely to be considered Fourth Amendment "searches," because that Amendment has not generally been applied to direct questioning. Instead, historically, when "the objective is to obtain testimonial rather than physical evidence, the relevant constitutional amendment is not the Fourth but the Fifth." *Greenawalt v. Ind. Dep't of Corr.*, 397 F.3d 587, 591 (7th Cir. 2005). As Judge Posner notes in *Greenawalt*, applying the Fourth Amendment to direct questioning would force the courts to analyze a wide range of novel contexts (e.g., courtroom testimony, police witness interviews, credit checks, and, as here, background checks) under a complex doctrine, with its cumbersome warrant and probable cause requirements and their myriad exceptions, that was designed with completely different circumstances in mind. *Id.* at 590-91. Moreover, declining to extend the Fourth Amendment

to direct questioning will by no means leave individuals unprotected, as such contexts will remained governed by traditional Fifth and Sixth Amendment interrogation rights and the right to informational privacy described above. *See id.* at 591-92.

E. ***Balance of Hardships***

The balance of hardships tips sharply toward Appellants, who face a stark choice—either violation of their constitutional rights or loss of their jobs. The district court erroneously concluded that Appellants will not suffer any irreparable harm because they could be retroactively compensated for any temporary denial of employment. It is true that "monetary injury is not normally considered irreparable," *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980), and the JPL employees who choose to give up their jobs may later be made whole financially if the policy is struck down. However, in the meantime, there is a substantial risk that a number of employees will not be able to finance such a principled position and so will be coerced into submitting to the allegedly unconstitutional NACI investigation. Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Moreover, the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.

On the other side of the balance, NASA has not demonstrated any specific harm that it will face if it is enjoined for the pendency of the adjudication from apply-

ing its broad investigatory scheme to "low risk" JPL contract employees, many of whom have worked at the laboratory for decades. As Caltech argues, JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958, so granting injunctive relief would make NASA no worse off than it has ever been. Moreover, an injunction in this case would not affect NASA's ability to investigate JPL personnel in "sensitive positions," significantly undercutting any lingering security fears. Finally, we note that NASA has taken years to implement NACI at JPL, a fact we construe as weakening any urgency in imposing the investigations before Appellants' claims are fully adjudicated on their merits.

III

Caltech separately argues that any injunctive relief should not encompass it because, as a private actor, it cannot be held liable for constitutional violations that arise from the government-imposed background investigations. Caltech is correct that there exists a "presumption that private conduct does not constitute government action." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). This presumption is rebutted, however, when a sufficient nexus "make[s] it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some *willful participation in a joint activity* by the private entity and the government." *Id.* at 843 (emphasis added).

Caltech notes that it initially opposed the new background investigations, which are conducted entirely by NASA and other government agencies; therefore, it claims that the investigations are not "joint activities"

and Caltech is not a "willful participant." We have some sympathy for this argument, and if Caltech had done nothing more than abide by the contract terms unilaterally imposed by NASA, we might agree with its position. Here, however, the record is clear that Caltech did do more—it established, on its own initiative, a policy that JPL employees who failed to obtain federal identification badges would not simply be denied access to JPL, they would be terminated entirely from Caltech's employment. This decision does not necessarily render Caltech liable as a governmental actor, but it raises serious questions as to whether the university has in fact now become a willful and joint participant in NASA's investigation program, even though it was not so initially. Caltech's threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights. Moreover, with the government enjoined, Caltech faces no independent harm to itself, so the balance of hardships tips overwhelmingly in Appellants' favor. Therefore, we hold that preliminary injunctive relief should apply both to Caltech and to Federal Appellees.

IV

Appellants have raised serious questions as to the merits of their informational privacy and APA claims, and the balance of hardships tips sharply in their favor. The district court's denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion. Accordingly, we reverse and remand with instructions to fashion preliminary injunctive relief consistent with this opinion.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56424

ROBERT M. NELSON; WILLIAM BRUCE BANERDT; JULIA BELL; JOSETTE BELLAN; DENNIS V. BYRNES; GEORGE CARLISLE; KENT ROBERT CROSSIN; LARRY R. D'ADDARIO; RILEY M. DUREN; PETER R. EISENHARDT; SUSAN D.J. FOSTER; MATTHEW P. GOLOMBEK; VAROUJAN GORJIAN; ZAREH GORJIAN; ROBERT J. HAW; JAMES KULLECK; SHARLON L. LAUBACH; CHRISTIAN A. LINDENSMITH; AMANDA MAINZER; SCOTT MAXWELL; TIMOTHY P. MCELRATH; SUSAN PARADISE; KONSTANTIN PENANEN; CELESTE M. SATTER; PETER M.B. SHAMES; AMY SNYDER HALE; WILLIAM JOHN WALKER; PAUL R. WEISSMAN, PLAINTIFFS-APPELLANTS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; CALIFORNIA INSTITUTE OF TECHNOLOGY, DEFENDANTS-APPELLEES

Oct. 11, 2007

ORDER

Before: B. FLETCHER, STEPHEN REINHARDT and MARSHA S. BERZON, Circuit Judges.

Appellants' motion for an injunction pending appeal is granted. Appellants raise serious legal and constitutional questions, and the balance of hardships tips sharply in their favor. *See Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983), *rev'd in part on other grounds*, 463 U.S. 1328, 104 S. Ct. 10, 77 L. Ed. 2d 1431 (1983), 464 U.S. 879, 104 S. Ct. 221, 78 L. Ed. 2d 217 (1983).

Appellants raise various legal and constitutional challenges to appellees' requirement that appellants each complete a questionnaire and execute a waiver for release of information. The questionnaire requires some information to which appellants do not object, such as appellant's name, date of birth, place of birth, and social security number. However, the questionnaire also includes inquiries to which appellants do object, including an inquiry about counseling they may have received. Appellants also object to the general waiver for release of information on the ground that it is overly broad and is not limited to information pertinent to their identity.

Appellees' questionnaire and waiver were adopted to implement Homeland Security Presidential Directive 12 (HSPD-12), which requires the promulgation of a federal standard for "secure and reliable forms of identification." Appellees' interest in obtaining the completed

forms for the purpose of investigating the identity of appellants is questionable, as the information that may be obtained goes far beyond that purpose. The waiver for release of information form authorizes appellees to perform a background investigation "to obtain any information relating to activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." Most appellants have worked for the Jet Propulsion Laboratory for over twenty years; none are required to have security clearances, as none have access to classified or secret material. All appellants have been designated "low risk" employees.

Because of the nature of the information subject to which the waiver applies, serious privacy concerns arise. This court has recognized the right to informational privacy. To justify actions infringing upon the right, the government must show that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet that interest. *See In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999); *see also Whalen v. Roe*, 429 U.S. 589, 598-99, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

The balance of hardships tips sharply in favor of appellants because if appellants do not complete the questionnaires for non-sensitive positions and the waivers for release of information, they are scheduled to lose their jobs before the appeal will be heard. On the other side of the scale, there is no emergency as to appellees' need for the answers to the questionnaires or for the execution of the waiver forms during the less than two months remaining before the case will be argued; it has been more than three years since the Presidential Directive

the government is relying upon was issued. Moreover, the need for the information to be collected is questionable in general, given the absence of any apparent relationship between its collection and the production of reliable identification cards for these employees. Accordingly, the injunction granted by this court on October 5, 2007 will continue in effect pending an expeditious appeal.

Appellants' motion for a stay of district court proceedings is denied.

The briefing schedule previously established remains in effect.

The Clerk shall calendar this appeal during the week of December 3-7, 2007, in San Francisco or Pasadena, California.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 07-5669 ODW (VBKx)

ROBERT M. NELSON, WILLIAM BRUCE BANERDT, JULIA BELL, JOSETTE BELLAN; DENNIS V. BYRNES, GEORGE CARLISLE, KENT ROBERT CROSSIN, LARRY R. D'ADDARIO, RILEY M. DUREN, PETER R. EISENHARDT, SUSAN D.J. FOSTER, MATTHEW P. GOLOMBEK, VAROUJAN GORJIAN, ZAREH GORJIAN, ROBERT J. HAW, JAMES KULLECK, SHARLON L. LAUBACH, CHRISTIAN A. LINDENSMITH, AMANDA MAINZER, SCOTT MAXWELL, TIMOTHY P. MCELRATH, SUSAN PARADISE, KONSTANTIN PENANEN, CELESTE M. SATTER, PETER M.B. SHAMES, AMY SNYDER HALE, WILLIAM JOHN WALKER AND PAUL R. WEISSMAN, PLAINTIFFS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; CALIFORNIA INSTITUTE OF TECHNOLOGY; AND DOES 1-100, DEFENDANTS

[Filed: Oct. 3, 2007]

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

This is a privacy rights action brought by 28 plaintiffs who are scientists, engineers, and other personnel employed by California Technical Institute to work at NASA's Jet Propulsion Laboratory pursuant to a government contract. Plaintiffs object to Defendants' implementation of a new security background check.

Plaintiffs allege that the implementation of the new security measures violate: (1) their Fourth Amendment protection from unreasonable searches and seizures; (2) their Fourteenth Amendment right to privacy; (3) the Administrative Procedure Act; (4) the Privacy Act; and (5) the California Constitution. Plaintiffs seek injunctive and declaratory relief. This Court has jurisdiction to hear this action under 28 U.S.C. § 1331.

Currently before the Court is Plaintiffs' Motion for Preliminary Injunction, filed on August 30, 2007. Plaintiffs argue that, if a preliminary injunction is not granted, they will either have to comply with the new security measures or risk losing their jobs. After review of the parties' submissions, the *amicus curiae* briefs and the case file, as well as the arguments advanced by counsel at the hearing, the Court hereby DENIES Plaintiffs' Motion for Preliminary Injunction.

II. FACTUAL BACKGROUND

Defendant National Aeronautics and Space Administration ("NASA") was created by Congress in 1958. Defendant California Institute of Technology ("Caltech") is a non-profit educational institution located in Pasadena, California. The Jet Propulsion Laboratory ("JPL") is an operating division of Caltech, staffed entirely by Caltech employees. Since 1959, Caltech has operated JPL pursuant to a written contract as a NASA Federally Funded Research and Development Center. In short, Plaintiffs are contract employees for the federal government. JPL's actual physical facilities are also owned by NASA.

The 28 named Plaintiffs are scientists, engineers, and administrative support personnel employed by Caltech to work at the JPL facility on NASA programs. Plaintiffs allege that many of the named plaintiffs have worked at JPL for more than 20 years. None of the plaintiffs allegedly have had prior security clearances nor have they previously worked with classified material of any kind. Plaintiffs further contend that all research data that they generate is in the public domain and their findings are freely shared with the scientific community and the public.

On August 27, 2004, President Bush signed Homeland Security Presidential Directive 12 ("HSPD-12"), entitled "Policy for a Common Identification Standard for Federal Employees and Contractors," applicable to all Executive Branch departments and agencies. HSPD-12 directed the Secretary of Commerce to promulgate a Federal standard for "secure and reliable forms of identification" within six months. HSPD-12 defined "secure and reliable forms of identification" to mean identifica-

tion that is: (a) "issued based on sound criteria for verifying an individual employee's identity;" (b) "strongly resistant to identity fraud, tampering, counterfeiting and terrorist exploitation;" (c) "can be rapidly authenticated electronically;" and (d) "is issued only by providers whose reliability has been established by an official accreditation process."

In response to HSPD-12, in March 2006, the U.S. Department of Commerce ("DOC"), also named as a defendant in this action, promulgated a standard entitled "Personal Identification Verification (PIV) of Federal Employees and Contractors," codified at FIPS PUB 201-1. The sole authority for the PIV standard was based on HSPD-12 and imposed a background investigation requirement for all employees or contractors seeking to obtain the new form of identification. The PIV standard mandates that "only an individual with a background investigation on record is issued a credential." The PIV standard further specifies that the background investigation required for federal employment will be a "National Agency Check with Inquires," or its equivalent.

On May 24, 2007, NASA incorporated the above-mentioned requirements through a NASA Interim Directive, NPR 1600.1 ("NASA Directive"), that established a new "agency-wide policy for the creation and issuance of federal credentials at NASA." The NASA Directive states that it is being implemented in compliance with HSPD-12 and the PIV standard established by the DOC.

After the NASA Directive was established, JPL personnel were informed that they would have to submit to a background investigation, the extent of which would be determined by their position's risk level. The back-

ground investigation is a prerequisite to receiving the required PIV badge.

For "low risk" employees, such as all plaintiffs in this case, the investigation begins with completion of Standard Form 85 ("SF-85"), a questionnaire for non-sensitive positions. SF-85 requires various types of background information to which Plaintiffs do not object, such as name, date of birth, place of birth, social security number, etc. The form also requires information about employment and residential history for the past five years, educational history starting with high school, the names of three individuals who know the applicant well, and a statement as to whether the applicant has used illegal drugs in the past year.

Applicants are also required to sign, as part of SF-85, an "Authorization for Release of Information," which authorizes the agency to collect "any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." *See* SF-85 at p.6. Plaintiffs argue that the language in the waiver is overly broad considering the "low risk" nature of their jobs.

After the waiver is signed, written inquires are then made to educational institutions, former employers, landlords, and references. These inquires are used to verify the applicant's historical information. Plaintiffs allege that the landlords, past employers, etc. are also asked to report any adverse information they have on the plaintiff with respect to "abuse of alcohol or drugs," "financial integrity," "mental or emotional stability," "general behavior or conduct," and "other matters."

The NASA Directive states that if the investigation process yields any "derogatory or unfavorable information," it will be forwarded to the Human Resources Officer for JPL, who will determine "employment suitability." JPL has allegedly posted on an internal website the various grounds upon which "employment suitability" will be determined. The grounds allegedly include "infrequent, irregular but deliberate delinquency in meeting financial obligations," "pattern of irresponsibility as reflected in . . . credit history," "sexual misconduct with impact on job," "sodomy," "attitude," "personality conflict," "absenteeism or attendance problems," "homosexuality," "judgment, reliability and dependability issues," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation."[1]

Plaintiffs allege that they have been informed at public meetings and by JPL senior administrators that if they do not have their PIV badge by October 27, 2007, they will be barred from the JPL premises and will be deemed to have terminated their employment with JPL. Plaintiffs have until October 5, 2007 to fill out SF-85 and other required documents in order to be eligible to re-

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[1] While Plaintiffs allege that JPL's internal policy specifically mentions "homosexuality," "judgment, reliability and dependability issues," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation" as grounds upon which a person can be determined unsuitable for employment, the exhibit Plaintiffs use to support this allegation is devoid of any mention of these particular "grounds." *See* Exhibit R attached to the Penanen Declaration.

ceive their PIV badge by October 27, 2007. Because of this, Plaintiffs allege that they will suffer irreparable harm. Accordingly, Plaintiffs have filed the instant motion for preliminary injunction.

III. DISCUSSION

A. Legal Standard—Preliminary Injunction

In deciding whether to issue a preliminary injunction, a court must balance the plaintiffs' likelihood of success against the relative hardship to the parties. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999). A court may appropriately issue a preliminary injunction where the "plaintiffs demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor." *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (internal quotation marks omitted). "These two alternatives represent 'extremes of a single continuum,' rather than two separate tests." *Clear Channel Outdoor Inc. v. City of L.A.*, 340 F.3d 810, 813 (9th Cir. 2003) (quoting *Walczak*, 198 F.3d at 731). "Thus, the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party." *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005).

The district court must also consider whether the public interest favors issuance of the injunction. *Id.* "This alternative test for injunctive relief has been formulated as follows: a plaintiff is required to establish '(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if prelimi-

nary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).'" *Shelley*, 344 F.3d at 917-18 (quoting *Johnson v. Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)).

B. Analysis

1. Standing and Ripeness

"Article III of the [U.S.] Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 468 U.S. 737, 750 (1984). "In order to ensure that a federal court's Article III power has been properly invoked, the courts have developed several doctrines, including standing, mootness, and ripeness, each of which imposes a different requirement on the substance of a plaintiffs claim." *Lee v. State of Or.*, 107 F.3d 1382, 1387 (9th Cir. 1997) (citing *Allen*, 468 U.S. at 750). These doctrines present threshold questions pertaining to federal court jurisdiction. Thus, "[b]efore the judicial process may be invoked, a plaintiff must show that the facts alleged present the court with a case or controversy in the constitutional sense and that [they are] proper plaintiff[s] to raise the issues sought to be litigated." *Olagues v. Russoniello*, 770 F.2d 791,796 (9th Cir. 1985) (citations omitted). We are particularly concerned in this case with standing and ripeness.

To establish standing, a plaintiff must demonstrate that he has suffered an "injury in fact"—"an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Whether a dispute is ripe depends

on 'the fitness of the issues for judicial decision' and 'the hardship to the parties' of withholding review." *Hotel Employees and Rest. Employees Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d 1507, 1512-13 (9th Cir. 1993) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967) (*abrogated on other grounds*)). Plaintiffs bear the burden of alleging the facts necessary to establish standing and ripeness. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

Here, it is first necessary to determine the alleged cause of Plaintiffs' injury or potential injury. It is the "cause" of potential injury or injuries that initially appears intertwined and confusing. However, for the sake of clarity, the Court separates Plaintiffs' grievance into two parts. First, Plaintiffs argue that SF-85 is overly broad and intrusive considering the "low-risk" nature of their jobs at JPL. Second, Plaintiffs argue that JPL's internal policy, which lists various grounds upon which an employee can be determined unsuitable for employment, is unconstitutional. The Court feels that by separating Plaintiffs' allegations into these two distinct issues, the standing and ripeness issues can be better analyzed.

First, dealing with the SF-85 argument alone, it appears that Plaintiffs have standing and their allegations regarding SF-85 are ripe for review. "Where only injunctive or declaratory relief is sought, a plaintiff must show 'a very significant possibility' of future harm in order to have standing to bring suit." *Coral Const. Co. v. King County*, 941 F.2d 910, 929 (9th Cir. 1991) (quoting *Nelsen v. King County*, 895 F.2d 1248, 1250 (9th Cir. 1990). "The complainant must allege an injury to himself that is distinct and palpable, as opposed to merely

abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical." *Whitmore* v. *Ark.*, 495 U.S. 149, 155 (1990) (citations omitted). Here, it is undisputed that if Plaintiffs do not sign the SF-85 waiver by October 5, 2007 they will not receive their identification badges. Without their badges they will not have access to the JPL premises and will thus be deemed to have voluntarily resigned. It appears that this is a concrete injury that is imminent and not hypothetical.

Second, the Court looks to Plaintiffs' attack on JPL's internal policy that explains when someone is "unsuitable" for employment. It is clear that this "policy" has not caused an "injury in fact." There is also not an imminent injury. It is strictly speculative to allege that JPL's "policy" will ever come into play. In addition, there have been no facts to show that the "policy" is truly a JPL policy or just a list found on JPL's internal website. Accordingly, the Court finds that Plaintiffs do not have standing to attack this alleged policy. And the policy itself is also not ripe for review. Therefore, to streamline this case, the Court will only focus on SF-85 and whether the government is justified in requiring Plaintiffs to sign the form.

2. Likelihood of Success on the Merits

a. Plaintiffs' Fourth Amendment Claim

Plaintiffs' contention is that the SF-85 form and waiver required by NASA are unreasonable searches in violation of the Fourth Amendment. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."

The Court agrees with Defendants' argument that the Fourth Amendment has never applied to background checks. And, if the Fourth Amendment does apply to this case, Plaintiffs have not shown how. Plaintiffs rely on cases addressing whether the search of an employee's body and seizure of bodily fluids through a drug testing constitutes an unreasonable search and seizure. Plaintiffs make no argument that a questionnaire, background check, or authorization to release records constitutes a "search." Plaintiffs bear the burden to demonstrate that a search or seizure has occurred, that they have a "reasonable expectation of privacy" in the information being sought, and that the expectation of privacy is "protectable" in this specific instance. In short, Plaintiffs have not shown the Court how the Fourth Amendment applies.

In addition, even if Plaintiffs were able to show that a background check invokes the Fourth Amendment, the Supreme Court has noted that "we have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment." *U.S. v. Karo*, 468 U.S. 705, 712 (1984). Here, there has not been an actual invasion of privacy, but only a potential invasion since the government has not yet checked any of the Plaintiffs' backgrounds. Therefore, there is not a likelihood that Plaintiffs' Fourth Amendment claim will succeed on the merits.

b. Plaintiffs' Fourteenth Amendment Claim

Plaintiffs' second claim alleges a "[v]iolation of U.S. Constitution, Fourteenth Amendment." *See* Compl, ¶ 19. However, the Fourteenth Amendment applies only to the states, not the federal government. *See* U.S.

Const. amend. XIV, § 1 (". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."); *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[the] Fourteenth Amendment . . . applies only to the states."). Here, Plaintiffs allege no conduct by any state or state agency, and they present no argument that the Fourteenth Amendment should apply to the federal government, a federal agency, or a private entity acting pursuant to a federal directive. Plaintiffs concede in their Joint Reply that the Fourteenth Amendment does not apply to the federal government. *See* Joint Reply at p.7. Accordingly, Plaintiffs are unlikely to succeed on the merits of their Fourteenth Amendment claim.

c. **Plaintiffs' Claim that Defendants' Privacy Waiver and Background Investigation Policies Violate the Administrative Procedure Act**

The Administrative Procedure Act ("APA") requires courts to "hold unlawful and set aside agency action found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(c). In this case, Plaintiffs argue that the DOC and NASA acted as lawmakers by creating a mandate that federal contractors must submit to an extensive background check in order to gain access to federal facilities. Specifically, Plaintiffs argue that HSPD-12 itself contains no directive or policy regarding a background investigation, but is concerned only with the establishment of a "Federal standard for secure and reliable forms of identification." HSPD-12(2).

Defendants argue that the central purpose of HSPD-12 is to "enhance security" and, in so doing, HSPD-12 granted DOC the discretion to determine the "sound

criteria" agencies must use to verify employee and contractor identity. Accordingly, Defendants argue HSPD-12 necessarily authorizes some level of investigation and evaluation of the individual's background.

In addition, Defendants argue that Plaintiffs ignore the fact that NASA has the power to require background investigations via the National Aeronautics and Space Act of 1958 ("Space Act"). The Space Act states:

> The Administrator shall establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security. The Administrator may arrange with the Director of the Office of Personnel Management for the conduct of such security or other personnel investigations of the Administration's officers, employees, and consultants, and its contractors and subcontractors and their officers and employees, actual or prospective, as he deems appropriate; and if any such investigation develops any data reflecting that the individual who is the subject thereof is of questionable loyalty the matter shall be referred to the Federal Bureau of Investigation for the conduct of a full field investigation, the results of which shall be furnished to the Administrator.

42 U.S.C. § 2455(a). The language of the Space Act clearly gives NASA the authority to implement background investigations as part of the security screening of contractors. Therefore, it appears that Plaintiffs are unlikely to succeed on the merits of their APA claim.

d. Claim that Defendants' Policies Violate the Privacy Act

Plaintiffs claim that Defendants' policy directly violates several sections of the Privacy Act of 1974, codified at 5 U.S.C. § 552a(a)-(q). The Privacy Act requires that a federal agency "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency." 5 U.S.C. § 552a(e)(l). In addition to "maintaining" information, the Act's "legislative history also reveals a concern for unwarranted collection of information as a distinct harm in and of itself." *Albright v. U.S.*, 631 F.2d 915, 919 (D.C. Cir. 1980). Here, however, SF-85 specifically states that it complies with the Privacy Act. *See* SF-85 at p.2. Thus, until such time Plaintiffs can show that information collected via SF-85 was not properly maintained or gathered, the Court will give deference to an Executive Branch agency's assurance that its SF-85 complies with the Privacy Act.

Further, even if Plaintiffs might have a meritorious claim under the Privacy Act *after* the information is collected, the Ninth Circuit has noted that Congress did not intend to authorize the issuance of injunctions when dealing with certain sections of the Privacy Act. *Cell Assocs., Inc. v. Nat'l Insts. of Health, Dept. of Health, Ed. and Welfare*, 579 F.2d 1155, 1059 (9th Cir. 1978). Here, it appears that Plaintiffs are seeking a civil remedy under 5 U.S.C. §§ 552a(g)(1)(C) and/or 552a(g)(l)(D), which, as the Ninth Circuit has noted, do not provide for injunctive relief. *Id.* Therefore, while Plaintiffs' Privacy Act claim might have merit at a later time, it is not ripe for purposes of a preliminary injunction.

e. Informational Privacy

It appears that Plaintiffs' best claim is one for "informational privacy." While Plaintiffs have not specifically alleged "informational privacy" in their Complaint, they have given the allegation great weight in their papers that support their instant motion. Plaintiffs cite to Fed. Rule Civ. Pro. 8(f), which provides that "all pleadings shall be so construed as to do substantial justice." Thus, even though it is not clearly pled, the Court will entertain Plaintiffs' "informational privacy" claim here.

"While the Supreme Court has expressed uncertainty regarding the precise bounds of the constitutional 'zone of privacy,' its existence is firmly established." *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) and *Griswold v. Conn.*, 381 U.S. 479, 483 (1965)). The Ninth Circuit has "observed that the relevant Supreme Court precedents delineate at least two distinct kinds of constitutionally-protected privacy interests: 'One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.'" *Id.* (quoting *Doe v. Attorney Gen.*, 941 F.2d 780, 795 (9th Cir. 1991)).

It is clear that Ninth Circuit precedent supports Plaintiffs' claim for informational privacy, thus, the question before the Court is whether Plaintiffs are likely to succeed with this claim on the merits. "The right to informational privacy, however, 'is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest.'" *Id.* at 959 (quoting *Doe v. Attorney Gen.*, 941 F.2d at 796). "Our precedents demand that we 'engage in the delicate task

of weighing competing interests' to determine whether the government may properly disclose private information." *Id.* (quoting *Doe v. Attorney Gen.*, 941 F.2d at 796). Relevant factors to be considered include:

> . . . the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. (citing *Doe v. Attorney Gen.*, 941 F.2d at 796). "This list is not exhaustive, and the relevant considerations will necessarily vary from case to case." *Id.* "In each case, however, the government has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Id.* (citing *Doe v. Attorney Gen.*, 941 F.2d at 796). "In most cases, it will be the overall context, rather than the particular item of information, that will dictate the tipping of the scales." *Id.*

Here, the information requested is set forth in SF-85. SF-85 requires various background information to which Plaintiffs do not object, such as name, date of birth, place of birth, social security number, etc. The form also requires information about employment and residential history for the past five years, educational history starting with high school, the names of three individuals who know the applicant well, and a statement

as to whether the applicant has used illegal drugs in the past year.

A specific portion of SF-85 that the Court was initially troubled by was the illegal drug use question. However, the government has safeguarded Plaintiffs' Fifth Amendment rights by noting that an applicant's response to the drug use question will not be used against the applicant in any subsequent criminal proceeding. *See* SF-85 question 14. The government's instructions to SF-85 also state that "[g]iving us the information we ask for is voluntary." *See* SF-85 at p. 1. Therefore, the Court's analysis as to the first part of SF-85 tips in favor of the government, because the questionnaire itself is relatively non-intrusive. And, there are adequate safeguards in place when dealing with sensitive questions.

The second part of Plaintiffs' argument pertains to page six of SF-85, which contains the "Authorization for Release of Information." Plaintiffs argue that the language contained in the release is overly broad. Plaintiffs specifically object to the following language that the Court has italicized:

> I [a]uthorize *any* investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain *any* information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, *or other sources of information.* This information may include, *but is not limited to,* my academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information.

When analyzing the language of the release, it is necessary to apply the test from *Crawford*, which states that "the government has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 958. Here, the government has shown that it has an interest in "enhancing security" at federal facilities. The Court concludes that this is a legitimate governmental interest. Further, Defendants have declared that a "procedure whereby the government attempts to verify the correctness of the information entered onto the form substantially improves the probability of detecting individuals claiming a false identity." Federal Defendants' Opp'n at 6. Verifying the identity of federal contractors is also a legitimate interest.

The Court must now determine whether the government's actions are narrowly tailored to meet the legitimate interest. The Court is persuaded by the government's position that "[k]nowing the name of an individual does nothing to enhance security unless the agency also verifies that the individual is not connected to activity that poses a security threat." Federal Defendants' Opp'n at 12. Thus, the language in the release referring to "other sources of information" is justified because it allows the government some leeway in conducting its investigation. Indeed, the government notes that the release "must allow the investigators some flexibility to follow up on relevant needs." The Court agrees.

There are also safeguards in place on the face of the release that support the notion that the release is narrowly tailored. The release states: "for some sources of information, a separate release will be needed." This

language shows that the release does not cover all sources of information. The Court also reiterates that any potential information that *might* be uncovered as a result of the release is not relevant to the Court's analysis, because hypothetical harms are not ripe for review. Therefore, the Court finds, for purposes of this Order only, that the government's actions are narrowly tailored to meet its legitimate interest.

Plaintiffs also emphasize that the authorization form is overly broad *as applied* to each of the plaintiffs, because they are "low risk" contractors. However, the Court disagrees with this contention. The release itself is a standard SF-85. It does not seek extensive or overly-sensitive information. The Court also notes that NASA and its facilities require a relatively secure environment. And, while the Court concedes that JPL is not the Central Intelligence Agency, there are still very high-tech and sensitive devices at JPL, such as satellite monitoring equipment, that warrant strict security measures. Plaintiffs' argument that JPL's security has been lax up until now is unpersuasive. Accordingly, the evidence presented by Plaintiffs does not show a likelihood of success on the merits with regard to their informational privacy claim.

3. Possibility of Irreparable Injury to Plaintiffs

Plaintiffs argue that if a preliminary injunction is not granted, they will either have to comply with the new security measures or risk losing their jobs. Of course losing one's job and livelihood is a great harm. However, "[t]he key word in this consideration is *irreparable*. . . . The possibility that adequate compensatory or other corrective relief will be available at a later date, in

the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980) (emphasis added). As Defendants point out, any temporary denial of access to JPL does not amount to irreparable harm. Notably, there is an appeals process incorporated into the new security check process where applicants who are denied badges can seek redress from a three-person appeals panel. *See* Exhibit P in support of Plaintiffs' Motion at p. 19. If Plaintiffs were to succeed by way of the appeals panel, their access could then be restored, and Plaintiffs could resume working at the facility. Thus, this Court does not provide the only remedy available to Plaintiffs.

The other possible injury that Plaintiffs allege pertains to having to give out their private information. However, unlike other cases in the area of informational privacy, Plaintiffs here are not literally disclosing private information, aside from the illegal drug question discussed above. By filling out SF-85, Plaintiffs are simply giving authorization for the government to perform a background investigation. And at this point the Court is only looking at a facial challenge to SF-85. Anything that *might* arise after an employee signs the authorization form is purely speculative and not ripe for review. Therefore, the argument that Plaintiffs will suffer irreparable harm by signing an authorization form is without merit.

IV. CONCLUSION

For the forgoing reasons, the Court finds that Plaintiffs have not shown either a likelihood of success on the

merits or irreparable injury. Therefore, Plaintiffs' Motion for Preliminary Injunction is DENIED.

DATED: Oct. 3, 2007

/s/ OTIS D. WRIGHT
HON. OTIS D. WRIGHT II
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56424

ROBERT M. NELSON; ET AL., PLAINTIFFS-APPELLANTS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES, ET AL., DEFENDANTS-APPELLEES

June 4, 2009

ORDER

Before: DAVID R. THOMPSON and KIM MCLANE WARDLAW, Circuit Judges, and EDWARD C. REED, JR.,* District Judge.

Order; Concurrence by Judge WARDLAW; Dissent by Judge CALLAHAN; Dissent by Judge KLEINFELD; Dissent by Chief Judge KOZINSKI.

Judges Thompson, Wardlaw, and Reed voted to deny Appellees' petition for panel rehearing. Judge Wardlaw voted to deny Appellees' petition for rehearing en banc, and Judges Thompson and Reed so recommended.

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* The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. Judges O'Scannlain and Ikuta were recused.

The petition for rehearing en banc is denied.

IT IS SO ORDERED.

WARDLAW, Circuit Judge, concurring in the denial of rehearing en banc, joined by PREGERSON, REINHARDT, W. FLETCHER, FISHER, PAEZ, and BERZON Circuit Judges:

Because the preliminary posture and the lack of an evidentiary record prevent us from fully reviewing the merits of this appeal, because the panel opinion creates no intra- or inter-circuit split, and because the narrow holding does not present an issue of exceptional importance, the active judges of our court, in a vote that was not close,[1] denied rehearing of this case en banc. I concur.

This is an interlocutory appeal from the denial of a preliminary injunction sought by a class[2] of long-term

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[1] *Compare Cooper v. Brown*, 565 F.3d 581, 636 (9th Cir. 2009) (Reinhardt, J., dissenting from denial of rehearing en banc).

[2] The putative class consists of up to 9,000 employees-not merely the 28 class representatives referenced in Judge Callahan's dissent. Class representatives include preeminent research scientists who have coordinated the Mars Exploration Rover Mission, served on the Jet Propulsion Laboratory ("JPL") Senior Research Counsel, and led NASA's New Millennium Program and the Mars Pathfinder Mission. Class representatives also include leading engineers who have been at the forefront of many recent space missions, including the Mars Exploration Rovers Project, and the Galileo, Messenger (Mercury), and Magellan

California Institute of Technology ("Caltech") employees, including scientists, engineers, and administrative support personnel—all classified by the National Aeronautics and Space Administration ("NASA") as low risk employees.[3] They oppose implementation of a new, wide-ranging, and highly intrusive background check imposed as a condition of their continued employment at Jet Propulsion Laboratory ("JPL"). Caltech itself objected to the new requirement as "inappropriate." Reversing the district court's denial of the preliminary injunction, we concluded that, as to the constitutional right of privacy claim,[4] "serious questions going to the merits were raised and the balance of harms tips sharply in [the plaintiff-class's] favor," *Walczak v. EPL Pro-*

(Venus) missions, as well as JPL's chief engineer for flight dynamics, the project system engineer for the Kepler Space Observatory, and a lead principal engineer on the Constellation Program. Their research and findings have been published widely in scientific, peer-reviewed journals, and they have received hundreds of prestigious awards from NASA and the research community. The success of their scientific mission, which has been operating since 1958 without the new background checks, is renowned.

[3] Low risk employment positions do not involve policymaking, major program responsibility, public safety, duties demanding a significant degree of public trust, or access to financial records with significant risk of causing damage or realizing personal gain. *See* 5 C.F.R. § 731.106(b) (defining the characteristics of positions at the high or moderate risk levels). NASA itself designated members of the plaintiff class as low risk; low risk employees comprise ninety-seven percent of JPL employees. NASA's designation of every position subject to a suitability determination "as a high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency or integrity of the service" is authorized by the U.S. Office of Personnel Management. *See* 5 C.F.R. § 731.106(a).

[4] We affirmed the district court's rejection of the class's Administrative Procedure Act and Fourth Amendment claims.

long, Inc., 198 F.3d 725, 731 (9th Cir. 1999),[5] where the class faced the Hobson's choice of losing their jobs or submitting to an unprecedented intrusion into their private lives for which the government failed to advance a legitimate state interest. *Nelson v. NASA* (*Nelson II*), 530 F.3d 865, 883 (9th Cir. 2008). "[S]ubsumed in our analysis of the balance of hardship to the parties," *Golden Gate Rest. Ass'n v. City & County of S.F.*, 512 F.3d 1112, 1126 (9th Cir. 2008), was our determination that this "injunction is in the public interest," *Winter v. Natural Res. Def. Council, Inc.*, — U.S. —, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008), since it is indisputable that entry of the injunction "further[s] the public's interest in aiding the struggling local economy and preventing job loss," *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc).[6] *See Nelson II*, 530

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[5] Because our decision issued in December 2007, we did not have the benefit of the Supreme Court's most recent formulation of the preliminary injunction standard in *Winter v. Natural Resources Defense Council, Inc.*, —U.S.—, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008) (holding that a party requesting preliminary injunctive relief must demonstrate "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest"). Our result would be no different under *Winter*, however, because we did not apply the "possibility of irreparable injury" standard that the *Winter* Court found "too lenient." *Id.* at 375. Instead, we concluded that the employees "face[d] a stark choice—either violation of their constitutional rights or loss of their jobs." *Nelson II*, 530 F.3d at 881. "[C]onstitutional violations . . . generally constitute irreparable harm" and "the loss of one's job . . . carries emotional damages and stress, which cannot be compensated by mere back payment of wages." *Id.* at 882. Irreparable harm, therefore, was not only likely, but certain.

[6] Thus, the public interest requires consideration of the fact that the California unemployment rate reached 10.1 percent in January 2009

F.3d at 881-82. A prior three-judge panel of our court had ruled identically in issuing an injunction pending the merits hearing of this appeal. *Nelson v. NASA* (*Nelson I*), 506 F.3d 713, 715 (9th Cir. 2007).

Judge Callahan writes that, "[u]ntil now, no court has held that applicants have a constitutionally protected right to privacy in information disclosed by employment references." This is a misstatement of our panel's holding. No "applicants" are members of the putative class, only existing long-term employees. Each class member, when hired, underwent extensive background checks, including employment references. The employees challenge now a newly proposed, free-floating, wide-ranging inquiry with no standards, limits, or guarantee of non-disclosure to third parties, for which the government intends to coerce a "release" by threatening the loss of their jobs. Contrary to Judge Callahan's representation, the newly proposed investigation is not limited to information "voluntarily turn[ed] over to third parties."[7]

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due to the loss of 79,300 jobs, the largest unemployment increase in any state for the month, *see Regional and State Employment and Unemployment Summary*, U.S. Bureau of Labor Statistics 1, 3 (Mar. 11, 2009). Clearly, the public interest in minimizing job loss in this difficult economic climate, *The Lands Council*, 537 F.3d at 1005, weighs in favor of the injunction pending a merits determination. The loss of up to 9,000 jobs from one of Pasadena's largest employers would be particularly devastating in this community, which has an estimated labor force of 77,200 people. *See Monthly Labor Force Data for Cities and Census Designated Places February 2009*, State of California Employment Development Department (Mar. 20, 2009).

[7] Even if it was, Judge Callahan's contention misses the crucial point that the right to informational privacy and Fourth Amendment rights are not fully coextensive. *See Nelson II*, 530 F.3d at 880 n.5. In our opinion, we noted that although in the Fourth Amendment context there is a general principle "'that a person has no legitimate expecta-

Some of the information sought from neighbors, landlords, employment supervisors, and the like includes private sexual practices, sexual orientation, and physical and psychological health issues, and the government does not ask sources to limit their answers only to information voluntarily shared by the subject person. Judge Callahan also suggests that our opinion protects information about drug treatment "in the face of a legitimate need by the employer to protect the safety and security of a facility." The opinion does no such thing—rather, we specifically noted that *in this context*, open-ended inquiries and questions regarding drug treatment are not *narrowly tailored* to a legitimate need to protect the facility. *Nelson II*, 530 F.3d at 880-81.

Our opinion is actually much narrower than Judge Callahan would have her audience believe. Adhering to our precedent in *In re Crawford*, 194 F.3d 954 (9th Cir. 1999) (holding that public disclosure of Social Security numbers implicates the right to informational privacy), *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998) (holding that unauthorized employer testing for sensitive medical information violates employees' right to informational privacy), *Doe v. Attorney General*, 941 F.2d 780 (9th Cir. 1991) (holding that an individual's HIV-status is afforded informational privacy protection and that the government may seek

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tion of privacy in information he voluntarily turns over to third parties,'" *id.* (quoting *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979), and citing *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976)), "the 'legitimate expectation of privacy' described in this context is a term of art used only to define a 'search' under the Fourth Amendment, and *Miller* and *Smith* do not preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters," *id.*

and use such information only if its actions are narrowly tailored to meet legitimate interests), and *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding that a potential employee of the state may not be required to disclose personal sexual matters to gain the benefits of state employment), we concluded that only two aspects[8] of the government inquiries in the challenged Standard Form 85 ("SF 85") questionnaire and Investigative Request for Personal Information ("Form 42") raised serious informational privacy concerns. *Nelson II*, 530 F.3d at 879-81. After engaging in the requisite delicate balancing, we reasoned that although the government asserted several legitimate interests in investigating its contract employees, it had failed to demonstrate that its inquiry was narrowly tailored to meet those interests; further, the government asserted no legitimate interest to justify inquiries regarding drug treatment, as opposed to drug use. *Id.* We reversed the district court *only* to the extent that the government sought disclosure of "any treatment or counseling received" at *any* time for drug problems, *id.* at 879, and planned to engage in a free-ranging investigation of the most private aspects of class members' lives, *id.* at 880-81.

I.

The class challenges the limitless nature of the private information the government now seeks and the potential uses for this information. The newly instated

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[8] The class also challenged the investigation as lacking in statutory authority under the Administrative Procedure Act, and argued that all aspects of the investigation, including the Form 42 request and the entire SF 85 questionnaire, were unconstitutional under the Fourth Amendment.

NASA Procedural Requirements incorporate the Personal Identity Verification ("PIV") standard promulgated by the Department of Commerce under Homeland Security Presidential Directive 12 ("HSPD-12").[9] These requirements mandate that every JPL contract employee undergo a National Agency Check with Inquiries ("NACI") before he can obtain the new identification badge required for access to JPL facilities. As part of a NACI, JPL employees must submit SF 85, which seeks a host of information subsequently checked against four government databases, and sign an Authorization for Release of Information which permits the government to collect information about the employee. *Nelson II*, 530 F.3d at 870-71. The government collects information through Form 42.[10] *Id.* at 871. Once the information has been collected, NASA determines whether an employee is "suitable" for continued access to its facilities. *See* 5 C.F.R. § 731.103(a) ("[The U.S. Office of Personnel Management] delegates to the heads of agencies authority for making suitability determinations and taking suitability actions."). Because Caltech established a policy that JPL employees who fail to obtain new identification badges will be terminated, a negative suitability determination results in the loss of employment with attendant harm to the employee's career.

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[9] HSPD-12 was issued in response to identity fraud concerns raised by the 9/11 Commission. It directed the U.S. Secretary of Commerce to develop a uniform "standard for secure and reliable forms of identification." Directive on Policy for a Common Identification Standard for Federal Employees and Contractors, 2004 Pub. Papers 1765, 1765 (Aug. 27, 2004).

[10] The information requested in SF 85 and Form 42 and the scope of the Authorization for Release of Information are described in our opinion. *See Nelson II*, 530 F.3d at 871.

There is nothing in the record to support Judge Callahan's statement that the government inquiry in Form 42 is limited in any way to information that class members "voluntarily turn over to third parties." The record demonstrates the contrary: the Authorization for Release of Information authorizes any investigator conducting a background check using Form 42 to obtain information not only from past employers, landlords, and educational institutions, but also from any other sources of information that the investigator wants to consider. And, contrary to Judge Kleinfeld's suggestion, the release specifically states that the investigation is *not* limited to these sources. "[T]he form invites the recipient to reveal *any* negative information of which he or she is aware," no matter how that "information" fell into the hands of the source. *Nelson II*, 530 F.3d at 881. Judge Kleinfeld also belabors the usefulness of open-ended questions when an employer interviews a potential employee, but misses the distinction between that necessary practice and the standardless and limitless mining of highly personal and employment-irrelevant data from third parties at issue here. There are serious questions as to whether such open-ended inquiries are invasive of privacy rights; reasonable reference checks and interviewing techniques, on the other hand, remain within the government's prerogative.

Moreover, the record suggests that the government will seek private information unrelated to employment and use such information to determine suitability for employment. At multiple meetings about the new procedures, class members specifically asked about the investigation's scope and the criteria analyzed to make the suitability determination. The program directors refused to answer questions about scope and criteria. The

only information class members were able to glean about the proposed use of SF 85 and Form 42 and the suitability determination came from a document accidentally posted on the JPL internal HSPD-12 website between about August 2, 2007, and September 11, 2007.

The document, entitled "Issue Characterization Chart," listed "sodomy," "carnal knowledge," "abusive language," "personality conflict," "bad check," "credit history," "physical health issues," and "mental, emotional, psychological or psychiatric issues" as suitability issues. The Issue Characterization Chart further indicates that "[h]omosexuality, in and of itself, while not a suitability issue, may be a security issue and *must be addressed completely,* when indications are present of possible susceptibility to coercion or blackmail" (emphasis added). Far from the minimally intrusive questions to former employers and named references that Judges Callahan and Kleinfeld portray, the record shows the very real potential for intrusions into undisclosed private sexual, financial, and health matters and the use of those private matters to determine job suitability. As our opinion states, "[t]he record is vague as to the exact extent to and manner in which the government will seek this information." *Id.* at 871.

Judge Callahan represents that the safety and security of federal facilities is implicated by enjoining the government from a limitless investigation into the class members' private lives. In a similar vein, Judge Kleinfeld suggests that our opinion "enjoin[ed] reasonable reference checks on applicants for federal government functions" in a manner "likely to impair national security." In addition to the fact that this accusation again mistakenly focuses on applicants, whereas our opinion

addressed existing employees, Judge Kleinfeld's and Judge Callahan's claims are simply unsupportable. Our opinion did not issue a blanket injunction against the use of Form 42—we held only that the use of this Form to investigate low risk, existing contract employees raises serious legal questions. The government is obviously free to continue reasonable reference checks, and is even free to utilize Form 42 when the government's legitimate interests in investigation are sufficiently great and when the government adheres to proper limiting standards that narrowly tailor its quest for information. The fact that this Form may be frequently and appropriately used in other contexts does not mean that it would be proper here. Further, the opinion does not "forbid[] the government from making inquiries," as Judge Kleinfeld suggests. Nor does it affect the government's ability to confirm identity, take fingerprints, run criminal records checks, or compel individuals to disclose prior drug use. It preliminarily enjoins the government only from compelling the disclosure of any and all drug counseling and treatment information and from investigating without limits into areas of class members' lives unrelated to employment.

Judge Kleinfeld's complaint that we failed to consider the public interest in national security is similarly misguided. Our explanation of the nature of plaintiffs' low risk positions which do not involve public safety or a significant risk for causing damage, *id.* at 880-81, our careful analysis of the nonsensitive nature of their work, *id.*, our admonition that our decision "would not affect NASA's ability to investigate [employees] in 'high risk' or 'moderate risk' positions," *id.* at 882, and the notation that many successful years passed before NASA decided

to implement NACI,[11] *id.*, reflect our reasoned decision that national security is not implicated by the grant of a preliminary injunction. It is also worth noting that throughout this litigation the government itself has never argued the public interest in national security as a justification for its proposed background investigation.

The JPL, a research laboratory run jointly by NASA and Caltech, is not a vulnerable facility desperately in need of stronger security measures. JPL is located approximately five minutes to the north of our Pasadena courthouse off Interstate 210, and a large freeway sign directs the traveling public to the facility. JPL operates as a university campus rather than as a high-security government facility, encouraging students, visiting scientists (often foreign nationals), and other members of the public to enter and tour the facilities. JPL regularly opens its doors to all members of the public. Tens of thousands of visitors have unrestricted access to the lab with no requirement that they present identification.

When visitors arrive at the campus, they encounter only cursory random inspections of cars. Guards wave passenger cars through and take a quick peek inside trucks and busses. Drivers of trucks with chemicals and equipment park on campus while their identity is verified by presentation of a driver's license. Once a driver's identity is checked, the truck driver pulls right up to the buildings, a privilege enjoyed by less than thirty percent of the permanently badged employees.

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[11] Judge Kleinfeld misreads the record when he asserts that our injunction "stops the government from making the inquiries it has been making for decades"—the government concedes that it sought to impose the wide-ranging background check only as of 2007.

There are no metal detectors and no inspections of handbags.

While there are millions of dollars in taxpayer money invested in this facility and its operations, any risk that may exist derives from the complexity and unknown character of the subjects of JPL's exploration, not security concerns. JPL protects expensive government equipment with Flight Project Practices that govern every aspect of a mission's design, development, testing, and operations. These Practices require all critical activities to be peer-reviewed and independently validated. They are not affected by the issuance of new identification badges.

While the preliminary injunction remains in effect, the public may rest assured that the class members, many of whom have worked at JPL and Caltech for twenty to thirty years, have undergone serious security checks, which the government found sufficient to safeguard our national space effort up until two years ago when it first decided to impose its proposed limitless inquiry. A temporary restriction against a standardless investigation of employment-irrelevant data will have little to no impact on JPL, in part because of the security measures already in effect.

JPL currently uses secure and reliable forms of identification that comply with HSPD-12. HSPD-12 defines "secure and reliable forms of identification" as identification that "(a) is issued based on sound criteria for verifying an individual employee's identity; (b) is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation; (c) can be rapidly authenticated electronically; and (d) is issued only by providers whose reliability has been established by an official ac-

creditation process." 2004 Pub. Papers at 1766. Every contract employee entering the JPL facility must wear an appropriate badge that includes his photograph, an employee number, and a bar code. The "One NASA" badge, which NASA began issuing in response to HSPD-12, requires personal information, two forms of approved identification, and fingerprinting. The class does not challenge uniform identification measures or the requirements for obtaining a "One NASA" badge.

Judges Callahan and Kleinfeld fail to articulate how the two narrow aspects of the additional investigation sought by the government and temporarily enjoined impair national security. Surely, whether a Caltech scientist had "carnal knowledge," a personality conflict, or used abusive language at home would not impact our national security. Put another way, the dissenters (other than Judge Kozinski) seem to be suggesting that the government has an unlimited right to violate the most fundamental privacy interests of its contract employees because almost anything might affect national security. At a minimum, this is a serious legal question. That NASA has existed for more than fifty years without these inquiries, *see Nelson II*, 530 F.3d at 871, that the challenged program was implemented almost eight years after the government determined it should have more complete screening of contract employees, *id.*, and that class members are long-term employees of JPL who have previously undergone significant security checks, suggest that remand was appropriate to develop the record further and to allow class members to pursue their claim on an orderly basis.

II.

Judge Callahan asserts that our opinion diverges from the reasoning of two decisions by our sister circuits, *National Treasury Employees Union v. U.S. Department of Treasury*, 25 F.3d 237 (5th Cir. 1994), and *American Federation of Government Employees v. Department of Housing and Urban Development*, 118 F.3d 786 (D.C. Cir. 1997). Judge Callahan is incorrect. Both decisions are specifically grounded in the diminished privacy interests of individuals in public trust positions—positions not held by the low risk contract employees here.

In *National Treasury*, the Fifth Circuit recognized the constitutional right to privacy, stating that "[t]he extent to which an individual's expectation of privacy in the employment context is reasonable depends, in significant part, upon the employee's position and duties." 25 F.3d at 243-44. The Fifth Circuit emphasized that the plaintiffs, all of whom held positions at the high and moderate risk levels, were "public trust employees." *Id.* at 244. Public trust positions "involve policy-making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities or other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain." 5 C.F.R. § 731.106(b). Because "public trust employees know that they have diminished rights to withhold personal information that compromises the right of the public to repose trust and confidence in them," the Fifth Circuit concluded that they must complete the Standard Form 85P, Questionnaire for Public Trust Positions ("SF

85P"). *Nat'l Treasury*, 25 F.3d at 244. The Fifth Circuit also stated, "[w]e take pains to underscore the obvious: we are determining rights of [plaintiffs] in their capacity as public trust employees and certainly not in their role as ordinary private citizens." *Id.*

In *American Federation*, the D.C. Circuit also considered informational privacy in the context of public trust employees. 118 F.3d at 788. There, employees were found to be in public trust positions because of their access to a database that controlled $10 billion in annual government disbursements. *Id.* The D.C. Circuit analyzed each of the challenged questions, as we did in our opinion, and concluded that the agency provided "sufficiently important justifications for each item on the questionnaires" in light of the employees' diminished expectation of privacy as public trust employees. *Id.* at 793.

The class members here are low risk and thus do not have the diminished expectation of privacy of public trust employees. The class expressly excludes employees who have been designated as moderate or high risk. Many class members agreed to work for NASA with the understanding that they would not be required to work on classified materials or to obtain security clearances—precisely because they desired that their work remain in the public domain. Avoiding classified materials allows these scientists to subject their work to peer review, to collaborate with the best scientists worldwide, and to publish their results.

Although the Fifth and D.C. Circuits recognized that one factor that can diminish an individual's privacy interest is whether the information collected by the government is disseminated publicly, *Nat'l Treasury*,

25 F.3d at 244; *Am. Fed'n*, 118 F.3d at 793, neither one found that to be the dispositive factor. Each court held that constitutional interests were not violated because the protections against the disclosure of private information were combined with other important factors, such as the diminished expectation of privacy by individuals holding public trust positions. *Nat'l Treasury*, 25 F.3d at 244; *Am. Fed'n*, 118 F.3d at 794. Our opinion also recognizes that "[a]lthough the risk of public disclosure is undoubtedly an important consideration in our analysis, it is only one of many factors that we should consider." *Nelson II*, 530 F.3d at 880 (citation omitted). Moreover, plaintiffs have been informed that the information will be disclosed to Caltech, raising serious questions as to whether their privacy interest is diminished by this factor.

Finally, both *National Treasury* and *American Federation* were decided on a fully developed factual record that included a reasoned decision of the district court. The evidentiary record was critical to the courts' decisions. For example, after the district court held that an authorization similar to that in SF 85 violated the plaintiffs' constitutional right to informational privacy in *American Federation*, the D.C. Circuit reversed based on a government representation "that the legitimate use of the release form is limited to verifying information solicited by other parts of the form," and a finding that "the release authorizes the government to collect only information 'relevant' to determining the fitness of an individual for a public trust position." *Am. Fed'n*, 118 F.3d at 794. In contrast, here, the government "steadfastly refused to provide any standards narrowly tailoring the investigation to the legitimate interests they offer as justification," failing to limit the investigation to

relevant information or the verification of responses. *Nelson II*, 530 F.3d at 881.

III.

Chief Judge Kozinski's dissent thoughtfully raises a number of considerations to be taken into account in shaping the right of informational privacy. By asking a series of provocative questions about the doctrine, however, he only underscores our panel's conclusions that serious questions were raised justifying the preliminary injunction. *See Walczak*, 198 F.3d at 731. Ultimately, I disagree with his conclusion that we should have taken this case en banc to provide further guideposts towards resolving those questions. Erecting guideposts on a moving playing field would prove futile. Only a fully developed factual record, such as the one in *National Treasury* or *American Federation*, will allow us to thoroughly consider the nature of the privacy rights at issue and provide the clarity Judge Kozinski seeks.

We recognized in our opinion the distinction Judge Kozinski proposes between government collection and disclosure of information. As previously noted, we stated that "[a]lthough the risk of public disclosure is undoubtedly an important consideration in our analysis, it is only one of many factors that we should consider." *Nelson II*, 530 F.3d at 880 (citation omitted). It is not yet clear on this record, however, whether the government intends to disclose the information it collects. The class has specifically alleged that NASA will share the information collected with Caltech and possibly with other government agencies. Sharing this information with Caltech and other agencies is a potential violation of the Privacy Act. *See* 5 U.S.C. § 552a(b) (forbidding

agency disclosure of records "to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains"). Moreover, if the information is shared, Caltech is not precluded by the Privacy Act from further disseminating it.

Judge Kozinski also distinguishes between disclosures that the target may refuse and those imposed regardless of his consent. I agree that during the application process for a new job, disclosures may be refused simply by seeking other employment. In that context, requested disclosures may be inherently less invasive. Here, however, we have long-term employees suddenly forced to sign releases authorizing investigation into every aspect of their private lives or lose their jobs. As a practical matter, given the current economic environment, the unique nature of the work conducted at JPL, and the age and seniority of the plaintiff-employees, this is tantamount to a deprivation of the ability to obtain any future employment.

Judge Kozinski's third distinction—the difference between protecting fundamental rights and protecting a free-standing right not to have the world know bad things about you—would also be addressed more precisely with further record development. It appears, although it has yet to be conclusively proven, that the government intends to pry into constitutionally protected private matters. The Issue Characterization Chart suggests that sexual preference, sexual activity, medical treatment, counseling, and personal financial matters are at issue in the government's investigation. The Supreme Court has recognized a constitutional "interest in avoiding disclosure of personal matters," *Whalen v. Roe*,

429 U.S. 589, 591-93, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), and we and our sister circuits have defined this right to include the very types of matters implicated by the Issue Characterization Chart, *see, e.g., Sterling v. Borough of Minersville*, 232 F.3d 190, 196 n.4 (3d Cir. 2000) ("While we have not previously confronted whether forced disclosure of one's sexual orientation would be protected by the right to privacy, we agree with other courts concluding that such information is intrinsically private."); *Statharos v. N.Y. City Taxi & Limousine Comm'n*, 198 F.3d 317, 322-23 (2d Cir. 1999) ("[T]his Court has recognized the existence of a constitutionally protected interest in the confidentiality of personal financial information."); *Norman-Bloodsaw*, 135 F.3d at 1269 ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality."); *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) ("This constitutionally protected right [to privacy] is implicated when an individual is forced to disclose information regarding personal sexual matters."); *Thorne*, 726 F.2d at 468 ("The interest [the plaintiff] raises in the privacy of her sexual activities are within the zone protected by the constitution.").[12]

Similarly, the parties have yet to develop an evidentiary record as to whether the government intends to "dig into records" or simply to contact third parties. The government states that it would need another re-

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[12] *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), the case cited by Judge Kozinski to illustrate this third distinction, suggests that intimate details about sexuality and choices about sex are the type of private matters which implicate the constitutional right to privacy. *Id.* at 685. How these private matters play into this dispute requires further factual development.

lease to obtain medical records. However, the Authorization for Release of Information allows the government "to obtain any information relating to [a class member's] activities from . . . other sources of information" and to seek information that "is not limited to" job-related activities. The Issue Characterization Chart suggests that the government may pursue the more invasive of these two approaches. There is no evidence of what standards, if any, the government intends to apply.

Further record development is also required to determine whether the government is in fact acting as any other "private" employer. By unilaterally imposing the new requirements upon Caltech in the interest of securing federal facilities, the government is using special powers that are available to it only in its sovereign capacity. Private contracting parties would not have the ability to insist upon one-sided contract modifications that result in termination of a partner's employees of twenty or thirty years. Moreover, it appears that NASA—not Caltech—will make the suitability determination, but again, the class has not yet had the opportunity to submit evidence on this point.

We must rule on the record we have before us. Our ability to "clear the brush" will be enhanced when the record is fully developed. Even the Supreme Court would find it a much surer task to outline the contours of the doctrine of informational privacy with some of Judge Kozinski's questions actually answered. Therefore, I concur in the denial of en banc rehearing, and await the next round.

CALLAHAN, Circuit Judge, with whom KLEINFELD, TALLMAN and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

This case places before the court an issue of exceptional importance: the degree to which the government can protect the safety and security of federal facilities. With an annual budget of over $1.6 billion, NASA's Jet Propulsion Laboratory ("JPL") is the foremost leader in exploring the solar system's known planets with robotic spacecraft. As the lead center for NASA's deep space robotics and deep space communications missions, the science and technology developed at JPL for each mission entails extensive planning, research, and development, spanning years and costing taxpayers hundreds of millions of dollars. The technology developed at JPL features some of the most sensitive and expensive equipment owned by NASA, which involves a myriad of scientific, medical, industrial, commercial, and military uses.

Plaintiffs, twenty-eight scientists and engineers employed as contractors at JPL, object to NASA's requirement that they undergo the same personnel investigation for non-sensitive contract employees as those already in existence for all civil service employees in non-sensitive positions. Although the district court denied a motion for a preliminary injunction designed to prevent these personnel investigations from taking place, a panel of this court reversed, concluding that the district court's decision was based on legal errors. *See Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008). The panel held that a questionnaire asking applicants about treatment or counseling received for illegal drug use within the past year and a related written inquiry sent to references implicate the constitutional right to infor-

mational privacy. *See id.* at 879. Applying intermediate scrutiny, the panel held that the government did not have a legitimate state interest in asking applicants to disclose their drug treatment or counseling history, *id.*, and that the written inquiry was not narrowly tailored to serve the government's legitimate interests related to the security of JPL. *Id.* at 879-81.

I dissent from the denial of rehearing en banc because the panel's opinion constitutes an unprecedented expansion of the constitutional right to informational privacy. Further, assuming that the panel's opinion correctly assesses the scope of this right, it does not properly apply intermediate scrutiny. This expansion of constitutional privacy rights reaches well beyond this case and may undermine personnel background investigations performed daily by federal, state, and local governments.

Until now, no court had held that applicants have a constitutionally protected right to privacy in information disclosed by employment references. The Supreme Court has consistently held that individuals do not have a legitimate expectation of privacy in information they voluntarily turn over to third parties. *See, e.g., Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979); *United States v. Miller*, 425 U.S. 435, 442-44, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976). Similarly, no court had previously held that a government employee has a constitutionally protected right to privacy to prevent the disclosure of treatment or counseling received for illegal drug use in the face of a legitimate need by the employer to protect the safety and security of a facility. *Cf. Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (finding that disclosure of drug use can-

not violate constitutional right to informational privacy). Thus, the panel's opinion effects an unwarranted extension of the constitutional right to informational privacy.

Even assuming that a constitutional right to information privacy is implicated here, the panel fails to engage in the requisite "delicate balancing" of plaintiffs' privacy rights and NASA's legitimate need for information ensuring that those it trusts with access to JPL do not pose an unacceptable safety and security risk. The panel's opinion sets our circuit apart from the District of Columbia Circuit and Fifth Circuit, both of which have rejected privacy-based challenges to background checks similar to, or more intrusive than, the one here. *See Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786 (D.C. Cir. 1997); *Nat'l Treasury Employees Union v. U.S. Dep't of Treasury*, 25 F.3d 237 (5th Cir. 1994). These circuits emphasized that the information to be disclosed to the government in those cases would not be disclosed to the public; indeed, the D.C. Circuit recognized that even if a constitutional right to informational privacy is implicated, the Privacy Act, 5 U.S.C. § 552a(b), adequately safeguards against public disclosure.

I. Factual Background

A. Work conducted at the JPL facilities

JPL is a NASA facility that the California Institute of Technology ("Caltech") operates pursuant to a contract with NASA, and its facilities are an integral part of the nation's space program. JPL is the lead center for NASA's deep space robotics and deep space communications missions, which require broad access to many NASA physical and logical facilities. These missions en-

tail "extensive and detailed parallel planning, research, and development, often spanning years, scores of persons, and hundreds of millions of taxpayer dollars." JPL's discoveries have provided new insights into studies of the Earth, its atmosphere, climate, oceans, geology, and the biosphere; created the most accurate topographic map of the Earth; provided insight into global climate and ozone depletion; launched an oceanographic satellite to provide new details about the ocean seafloor; and provided space-based operational, communication, and information processing for the Defense Department. JPL operates a number of high profile projects including the Phoenix Mars Lander Mission, the Mars Exploration Rovers Mission, the Cassini Equinox Mission to Saturn, and the Voyager Mission to Jupiter, Saturn and beyond. The command center for the Mars Rovers, the Space Flight Operations Center for JPL missions, and JPL's Space Craft Assembly building are located on the JPL campus. JPL also partially manages the Deep Space Network, which is responsible for monitoring and communicating with numerous satellites and other space missions, and is involved in other highly confidential projects. All positions at JPL, from administrative support to engineers, scientists, and JPL's Director, are filled by contract employees.[1] Plaintiffs are scientists and engineers employed in some of the most important positions at JPL, including the remote operator of the Spirit and Opportunity Rovers that explore the surface of Mars and a navigation team member for the Phoenix Mars Lander Mission.

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[1] Caltech has filled JPL positions with about 5,000 of its own employees and with over 4,000 "affiliates" and contractors.

B. Implementation of Homeland Security Presidential Directive 12

The 9/11 Commission found that "[a]ll but one of the 9/11 hijackers acquired some form of U.S. identification document, some by fraud," and recommended that the federal government set standards for the issuance of identification because identification fraud is a concern at "vulnerable facilities." THE 9/11 COMMISSION REPORT 390 (2004). On August 27, 2004, the President of the United States issued Homeland Security Presidential Directive 12 ("HSPD-12") in response to security concerns identified by the 9/11 Commission Report and mandated that the Commerce Department develop a uniform federal standard, applicable to federal employees and contractors alike, for secure and reliable forms of identification. The order emphasized that the Commerce Department should act to eliminate the "[w]ide variations in the quality and security of forms of identification used to gain access to secure Federal and other facilities where there is potential for terrorist attacks. . . ." HSPD-12 ¶ 1.

Acting pursuant to this directive, the Commerce Department promulgated Federal Information Processing Standards ("FIPS") 201 and 201-1, which required security measures for contract employees commensurate with those applicable to comparable federal employees. FIPS 201-1 sets forth a standard for "identification issued by Federal departments and agencies to Federal employees and contractors (including contractor employees) for gaining physical access to federally-controlled facilities and logical access to Federally controlled information systems."

Since 1953, federal civil service employees have been subject to mandatory background investigations, with the scope varying based on the potential for adverse security consequences associated with a particular position. *See* Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953), *reprinted as amended in* 5 U.S.C. § 7311 (2007). Thus, for over fifty years, Executive Order 10,450 has required that "in no event shall the investigation [of civil service employees] include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person." *Id.* § 3(a). Now, under FIPS 201-1, federal contractors in non-sensitive positions must meet these same minimum security guidelines.

In 2001, before the promulgation of FIPS 201, NASA conducted an internal review of contractor security requirements and concluded that the failure of contractors to undergo background checks posed a vulnerability. NASA, acting pursuant to its statutory authority under the National Aeronautics and Space Act of 1958 (the "Space Act") to conduct "personnel investigations," revised NASA Procedural Requirement ("NPR") 1600.1, to require application of security requirements for contract employees parallel to those of federal employees. On November 8, 2005, NASA updated NPR 1600.1 to incorporate FIPS 201 and require that all low risk contractors be subject to a National Agency Check with Inquiries ("NACI") prior to the issuance of permanent NASA photo-identification. NASA explained that these requirements would "assist NASA Centers and component facilities in executing the NASA security program

to protect people, property, and information" by establishing "security program standards and specifications necessary to achieve Agency-wide security program consistency and uniformity." NPR 1600.1, § P.1.

Meanwhile, on August 5, 2005, the Office of Management and Budget ("OMB") provided guidance on the implementation of HSPD-12, requiring agencies "develop a plan and begin the required background investigations for all current contractors who do not have a successfully adjudicated investigation on record . . . no later than October 27, 2007." Memorandum from OMB on Implementation of Homeland Sec. Presidential Directive (HSPD) 12-Policy for a Common Identification Standard for Fed. Employees and Contractors 6 (Aug. 5, 2005). OMB stated that the completion of a NACI would be a prerequisite to the issuance of any identification. *Id.* at 5. Across all NASA facilities, over 57,000 individuals are subject to these new requirements, over 46,000 had applied as of August 31, 2007, and approximately 39,000 NASA contractors had completed the background investigation as of September 21, 2007.

C. The SF-85 Questionnaire and the Form 42 inquiries

The NACI requires the completion of a SF-85 Questionnaire, which asks the applicant to answer basic questions regarding citizenship, previous residences over the past five years, educational background, employment history over the past five years, selective service record, military history, and illegal drug use over the

past year.[2] The panel took issue with Question # 14, which asks:

> In the last year, have you used, possessed, supplied, or manufactured illegal drugs? When used without a prescription, illegal drugs include marijuana, cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), stimulants (cocaine, amphetamines, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.). (NOTE: Neither your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding.)
>
> If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs. Include any treatment or counseling received.

The SF-85 also asks for three references who know the applicant well. Form 42 written inquiries are then sent to educational institutions, former employers, landlords, and the designated references in order to verify the information on the SF-85 and confirm the applicant's trustworthiness and compliance with the law. Question # 7 on Form 42 asks references to indicate either "Yes" or "No" as to whether they "have any adverse information about this person's employment, residence or activities concerning:" "Violations of the Law," "Financial Integrity," "Abuse of Alcohol and/or Drugs," "Mental or

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[2] The SF-85 also includes an "Authorization for Release of Information," which may be used only for purposes of the SF-85 and is limited by the Privacy Act.

Emotional Stability," "General Behavior or Conduct," or "Other Matters." References are then asked whether they "wish to discuss the adverse information [they] have." If so, they can provide "additional information which [they] feel may have a bearing on this person's suitability for government employment or a security clearance. This space may be used for derogatory as well as positive information." Form 42 written inquiries are sent to roughly 980,000 recipients annually. 70 Fed. Reg. 61,320 (Oct. 21, 2005).

D. Procedural History

Plaintiffs filed suit on August 30, 2007, and subsequently moved for a preliminary injunction. The district court denied the plaintiffs' motion on a number of grounds, rejecting the plaintiffs' claims that NASA lacked the statutory authority to conduct these investigations, and that the NACI violated plaintiffs' informational privacy rights. The district court found that the NACI served a legitimate governmental interest, *i.e.*, to enhance security at federal facilities. Finding the NACI narrowly tailored with adequate safeguards in place, the court concluded that the government must be given some leeway in conducting its investigation to verify that applicants are not connected to activities that pose a security threat.

Plaintiffs filed an emergency motion for a stay of the district court's order. A panel of this court granted a temporary stay pending appeal. *Nelson v. NASA*, 506 F.3d 713 (9th Cir. 2007). Following an expedited briefing schedule and argument, a merits panel held that the district court abused its discretion and reversed the de-

nial of the preliminary injunction. *Nelson v. NASA*, 512 F.3d 1134 (9th Cir. 2008).

Subsequently, the panel vacated its opinion and filed a superseding opinion. *Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008) ("*Nelson II*"). The panel's opinion concludes that "the Space Act appears to grant NASA the statutory authority to require the [background] investigations," *id.* at 875, and that the portion of SF-85's Question # 14 requiring disclosure of prior drug use, possession, supply, and manufacture does not violate the plaintiffs' constitutional right to informational privacy. *Id.* at 878-79. However, the panel held that the portion of SF-85's Question # 14 requiring applicants to disclose "any treatment or counseling received" for illegal drug use, *id.* at 879, and Form 42's written inquiries violate the plaintiffs' constitutional right to informational privacy. *Id.* at 879-81. Accordingly, the panel concluded that "[t]he district court's denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion" and ordered the district court to issue an injunction. *Id.* at 883.

II. Discussion

A. The panel's expansion of the constitutional right to informational privacy is unprecedented

While the Supreme Court has never clearly addressed whether there is a constitutional right of privacy in the non-disclosure of personal information, *see Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977); *Whalen v. Roe*, 429 U.S. 589, 605-06, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), this circuit—along with a majority of other circuits—has

found a limited right to informational privacy.[3] *See In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999). We have said that constitutionally protected privacy interests include "avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of important decisions." *Id.* (citations omitted). "The right to informational privacy, however, is not absolute; rather, it is a conditional right which may be infringed upon a showing of proper governmental interest." *Id.* at 959 (internal quotation marks and citation omitted). Where a constitutional right to informational privacy is implicated, we apply intermediate scrutiny, which requires the government to show that "its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Id.* (internal quotation marks and citation omitted).

For example, we have held that an employer's nonconsensual pre-employment blood testing for syphilis, sickle cell genetic trait, and pregnancy implicated a constitutionally protected privacy interest in avoiding disclosure of personal, confidential medical information. *See Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269-70 (9th Cir. 1998). We have also held that a physician has a right to privacy in revealing whe-

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[3] The Sixth Circuit appears to be the only circuit to reject this view. *See Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir. 1999). In addition, recognizing that it was not writing on a "blank slate" because earlier decisions indicated that such a right existed, the District of Columbia Circuit has expressed "grave doubts" as to the existence of a federal right of confidentiality. *See Am. Fed'n of Gov't Employees*, 118 F.3d at 791. The First Circuit has similarly expressed concern, but declined to address the issue. *See Borucki v. Ryan*, 827 F.2d 836, 841-42 (1st Cir. 1987).

ther he or she has AIDS to prospective patients. *See Doe v. Att'y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991). Further, we have held that a female minor has a privacy interest in avoiding disclosure of the fact that she is pregnant as part of a judicial bypass proceeding used as an alternative to parental consent. *See Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 789-90 (9th Cir. 2002). We have also stated that questions during a polygraph given to a police officer applicant asking about a possible abortion and the identity of her sexual partners implicated this privacy right. *See Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983). And, we have held that a constitutional right of informational privacy may extend to the indiscriminate public disclosure of social security numbers out of a fear of identity theft. *See In re Crawford*, 194 F.3d at 958. Never before, however, has a court concluded that a government worker employed in a secure facility has a constitutional right of privacy to prevent the government from inquiring into whether that employee has received drug treatment within the past year or to prevent the government from sending a questionnaire to references in order to verify the veracity of the employee.

1. **There is no expectation of privacy in information disclosed by a designated reference responding to a questionnaire**

The panel's opinion concludes that individuals have a constitutionally protected right to privacy in information disclosed to third-party employment references. No other court has held as much, and for good reason—the Supreme Court "consistently has held that a person has no legitimate expectation of privacy in information

he voluntarily turns over to third parties." *Smith*, 442 U.S. at 743-44, 99 S. Ct. 2577 (citing *Miller*, 425 U.S. at 442-44, 96 S. Ct. 1619; *Couch v. United States*, 409 U.S. 322, 335-36, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973); *United States v. White*, 401 U.S. 745, 752, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293, 302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *Lopez v. United States*, 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462 (1963)); *see also SEC v. O'Brien*, 467 U.S. 735, 743, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984) (same). For example, the *Miller* Court held that a bank depositor did not have an expectation of privacy in financial information that he voluntarily turned over to banks and their employees in the normal course of business. The Court explained:

> The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. *This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities,* even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

425 U.S. at 443, 96 S. Ct. 1619 (emphasis added and citations omitted). Absent some privilege (*e.g.*, attorney-client, physician-patient, priest-penitent, marital, etc.), an applicant does not have an expectation of privacy to information disclosed by a reference.

The panel concludes that Fourth Amendment case law defining whether an individual has an expectation of privacy over information that he has already dissemi-

nated to the public is not the proper focus in the evaluation of information privacy rights and contends that, instead, we should focus on the general nature of the information sought. *See Nelson II*, 530 F.3d at 880 n.5. Although I agree with the panel that the constitutional right to informational privacy is not limited to Fourth Amendment searches, *see, e.g.*, *Thorne*, 726 F.2d at 468 (questions during a polygraph to a police applicant), I disagree with the suggestion that whether an individual has an expectation of privacy under a constitutional right to informational privacy is not informed by Supreme Court case law interpreting an expectation of privacy under the Fourth Amendment. In fact, one of the Supreme Court's first decisions recognizing a constitutional right to informational privacy specifically cited to Fourth Amendment case law in defining this right. *See Nixon*, 433 U.S. at 457-58, 97 S. Ct. 2777 (citing *Katz v. United States*, 389 U.S. 347, 351-53, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), in evaluating whether President Nixon had a legitimate expectation of privacy over presidential papers and tape recordings).

The panel's expansion of the constitutional right to privacy and what constitutes a legitimate expectation of privacy is unprecedented. The Supreme Court has planted a set of "guideposts for responsible decisionmaking" concerning limited fundamental rights "deeply rooted in this Nation's history and tradition" in an attempt "to rein in the subjective elements that are necessarily present in due-process judicial review." *Washington v. Glucksberg*, 521 U.S. 702, 720-22, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) (citations and quotation marks omitted). "[I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights to

marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.* at 720, 117 S. Ct. 2258 (citations omitted); *see also Thorne*, 726 F.2d at 468 (stating that informational privacy claims must fall within the zone protected by the constitution). "[E]stablishing a threshold requirement . . . avoids the need for complex balancing of competing interests in every case." *Glucksberg*, 521 U.S. at 722, 117 S. Ct. 2258. The panel's opinion expands the right to informational privacy by elevating personnel investigations to the realm of constitutional protection.

The panel's opinion opens the doors to lawsuits against employers who perform standard reference checks to ensure that applicants are suitable candidates for employment. In an area where States have sought measures to promote the free flow of information, *see, e.g.*, *Noel v. River Hills Wilsons, Inc.*, 113 Cal. App. 4th 1363, 7 Cal. Rptr. 3d 216, 220-21 (Ct. App. 2003) (recognizing that a California state statute extending a conditional privilege against defamatory statements applies in the employment context), the panel's opinion will have the opposite effect.

The panel's opinion also fails to adhere to the Supreme Court's recent admonition that there is "a crucial difference, with respect to constitutional analysis, between the government exercising 'the power to regulate or license, as lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist v. Or. Dep't of Agric.*, — U.S. —, —, 128 S. Ct. 2146, 2151, 170 L. Ed. 2d 975 (2008) (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 (1961) (rejecting Fifth Amend-

ment due process claim of civilian contractor summarily denied access to military facility for security reasons)). As the Court stated in *Engquist*, "in striking the appropriate balance" between employee rights and the government's needs as an employer, courts should "consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Id.* at 2152.

The constitutional right to informational privacy allows individuals to safeguard certain private information—like the fact that they have had an abortion or have contracted AIDS—and ensures that those wishing to keep such information from the eyes and ears of others can do so. However, those individuals that disclose such information to people like their landlords or employers lack any expectation that such information will be kept private. For this reason, plaintiffs have no expectation of privacy with respect to the Form 42 written inquiries.

2. There is no expectation of privacy for prior drug treatment or counseling when seeking employment with the government

The panel's opinion recognizes that the constitutional right to informational privacy does not protect an applicant from having to disclose to the government in a background investigation whether they have used, possessed, supplied, or manufactured illegal drugs within the past year. *Nelson II*, 530 F.3d at 878-79. However, the panel maintains that the plaintiffs are likely to succeed on their informational privacy challenge to a

follow-up question regarding the disclosure of "any treatment or counseling received" for illegal drug use once an applicant acknowledges involvement with illegal drugs in the past year. *Id.* at 879.

The panel's position is predicated on the assertion that "[i]nformation relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy." *Id.* (citing *Norman-Bloodsaw*, 135 F.3d at 1269, and *Doe*, 941 F.2d at 796). However, the authority the panel cites—*Norman-Bloodsaw* and *Doe*—respectively deal with the "highly private and sensitive medical and genetic information" from non-consensual pre-employment blood testing for syphilis, sickle cell genetic trait, and pregnancy, *see Norman-Bloodsaw*, 135 F.3d at 1264, 1269, and whether a doctor must disclose to patients that he has AIDS, *see Doe*, 941 F.2d at 796. We held in those cases that the constitutional right to informational privacy protects those individuals from having such highly private medical information enter the public domain. But here, the panel agrees that an applicant does not have a constitutional right to shield from the government the fact that he has used illegal drugs.

In *National Treasury Employees Union*, the Fifth Circuit noted that a public employee's expectation of privacy "depends, in part, upon society's established values and its expectations of its public servants, as reflected in our representative government." 25 F.3d at 243. Observing that "[t]oday's society has made the bold and unequivocal statement that illegal substance abuse will not be tolerated," the court held that "[s]urely anyone who works for the government has a diminished expectation that his drug and alcohol abuse history can be

kept secret, given that he works for the very government that has declared war on substance abuse." *Id.* I see no principled distinction between an applicant having to disclose that he has used illegal drugs and having to additionally indicate whether he sought treatment or counseling for illegal drug use. In *Mangels*, the Tenth Circuit, assessing the constitutionality of a requirement of public disclosure of illegal drug use by firefighters, stated "[t]he possession of contraband drugs does not implicate any aspect of personal identity which, under prevailing precedent, is entitled to constitutional protection. Validly enacted drug laws put citizens on notice that this realm is not a private one." 789 F.2d at 839 (citation omitted).

B. Even assuming that a constitutional right to privacy is implicated, NASA's procedures should be upheld because they are narrowly tailored to meet legitimate state interests.

Even if the SF-85's questions and Form 42 inquiries implicate a constitutional right to information privacy, the panel opinion's analysis does not give adequate weight to NASA's need for this information to ensure that those it trusts with access to JPL do not pose an unacceptable risk to the safety and security of the facility. It also fails to appreciate the fact that NASA's actions are narrowly tailored because the Privacy Act prevents public disclosure of this information.

1. Safety and security are legitimate state interests.

The panel's opinion acknowledges that NASA has a legitimate government interest in conducting background investigations. NASA must "protect its facilities

and their occupants from harm and its information and technology from improper disclosure." NPR 1600.1, § 4.1.1. In order to "ensure maximum protection of NASA assets," NASA determined that the security requirements for contractors should "be equitable with the employment suitability criteria for NASA Civil Service employees" and "be uniformly and consistently applied." *Id.* § 4.2.3.

The NACI has two components: the National Agency Check ("NAC"), which requires the completion of a SF-85, and the Form 42 Inquiries. Although a standard NAC checks name and fingerprint databases, the government determined that this was insufficient to accomplish the security objectives of HSPD-12 because these database checks would detect only individuals whose fingerprints are on file at the FBI or individuals for whom there is a known history with law enforcement or other government agencies. Thus, the government determined that a NACI was necessary because Form 42's written inquiries would help verify information on an employee's SF-85. The information would confirm or raise questions as to the applicant's trustworthiness and compliance with the law. The NACI provides a disincentive to using false information by subjecting an applicant to a potential perjury charge, and also creates a means by which the government can readily verify the validity of information entered onto the SF-85. This substantially improves the probability of detecting individuals claiming a false identity.

NASA has a legitimate need to ensure that those it trusts with access to its facilities do not pose an unacceptable risk to the safety and security of its costly equipment or its personnel. The work performed by the

plaintiffs at JPL involves some of the most sensitive and important technology developed by NASA, and implicates significant taxpayer money. Once individuals pass through one of the three main entrances, they have access to most of the facility and, while they may not be able to enter areas where classified work is actually being done, they can travel unescorted to any building on JPL's campus. Also, a NASA identification badge will ordinarily give access to other NASA facilities, and depending on other agencies' practices, access to other federal facilities. Accordingly, NASA must be able to ensure that those given identification badges meet at least minimum security guidelines.

2. NASA's procedures are narrowly tailored.

Balancing NASA's legitimate needs for this information with plaintiffs' right to keep this information private requires that we look to the "overall context." *See In re Crawford*, 194 F.3d at 959. Our engagement in the "delicate task of weighing competing interests" requires that we consider such factors as:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. (quoting *Doe v. Attorney Gen.*, 941 F.2d at 796).

The panel's opinion makes our circuit the first one to find that a background security questionnaire violates a constitutional right of privacy, and diverges from the reasoning of the D.C. and Fifth Circuits, both of which have rejected privacy-based challenges to background checks similar to, or more intrusive than, the one here. In *American Federation of Government Employees*, the D.C. Circuit held that, assuming a constitutional right to privacy even existed, the government "presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into their employees' privacy." 118 F.3d at 793. The background investigations at issue included the more extensive SF-85P Public Trust Positions and the SF-86 Sensitive Questionnaires. Significantly, the D.C. Circuit held that "the individual interest in protecting the privacy of the information sought by the government is significantly less important where the information is collected by the government but not disseminated publicly." *Id.* (noting that "the employees could cite no case in which a court has found a violation of the constitutional right to privacy where the government has collected, but not disseminated, the information").

The Fifth Circuit similarly found that the government employees in that case had no reasonable expectation of privacy in keeping confidential the information requested in the SF-85P Questionnaire. *See Nat'l Treasury Employees Union*, 25 F.3d at 244. The Fifth Circuit observed that the questionnaire requires the employees "only to disclose information to the [government], as their employer—not to anyone else, and certainly not to the public." *Id.*

The panel's opinion disregards the distinction between a privacy interest in avoiding *collection* of information by the government and an interest in avoiding *disclosure* by the government—a distinction recognized by both the D.C. and Fifth Circuits. This distinction is critical to this case because the government has provided adequate safeguards to ensure that the information is not disseminated to the public. The Privacy Act protects the information collected from public and/or unauthorized access and disclosure. *See* 5 U.S.C. § 552a(b). Courts have routinely held that security provisions designed to prevent the public disclosure of protected information weigh heavily in favor of the government. *See Whalen*, 429 U.S. at 601-02, 97 S. Ct. 869 (finding that extensive security procedures required by statute and regulation substantially reduce employees' privacy interests); *Lawall*, 307 F.3d at 790 (statute contained adequate protection to prevent unauthorized disclosure of abortion by minor female). In *American Federation of Government Employees*, the D.C. Circuit found it significant that the Privacy Act prohibited public dissemination of the information obtained in personnel background investigations. 118 F.3d at 793. The court was satisfied that the protections of the Privacy Act substantially reduced the employees' privacy interests. *Id.* at 793; *see also Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 118 (3d Cir. 1987) (holding "complete absence of comparable protection of the confidential information to be disclosed in response to the . . . questionnaire" was a significant factor in finding violation of right of privacy).

In addition to Privacy Act protection, FIPS 201-1 establishes detailed privacy requirements governing the collection and retention of information, including (1) the

assignment of a senior agency official to oversee privacy-related matters; (2) a Privacy Impact Assessment, ensuring that only personnel with a legitimate need for access to personal information are authorized to access this information; (3) continuous auditing of compliance; (4) use of an electromagnetically opaque sleeve or other technology to protect against any unauthorized contactless access to personal information; and (5) disclosure to applicants of the intended uses and privacy implications of the information submitted in order to obtain credentials. *See* FIPS 201-1, § 2.4. NASA also issued an Interim Directive augmenting NPR 1600.1, which details how "all [a]pplicants will have their information protected by applicable provision of the Privacy Act." The Privacy Act, FIPS 201-1, and NASA's Interim Directive ensure that collected information will not be disclosed to the public.

The panel, however, is concerned that Form 42's "open-ended questions appear to range far beyond the scope of the legitimate state interests that the government has proposed." *Nelson II*, 530 F.3d at 881. But an effective investigation of an applicant generally requires asking open-ended questions to allow investigators some flexibility to follow up on relevant leads. Instead, the panel's opinion would second-guess determinations regarding suitability for federal employment and the security of federal institutions that are best left to the Executive Branch.

In assessing whether NASA's actions are narrowly tailored, we look at the nature of the inquiry and ask whether it is an appropriate matter of inquiry based on the legitimate concerns raised by the government. *See Thorne*, 726 F.2d at 469. Form 42's questions to desig-

nated references are limited to "additional information which [they] feel may have a bearing on this person's suitability for government employment or a security clearance." In *American Federation of Government Employees*, the D.C. Circuit found a release form in a background investigation that authorized the government to collect "any information relating to my activities" sufficiently narrowly tailored because the Privacy Act limits the collection to "relevant" information in order to determine the fitness of an individual. 118 F.3d at 789, 794. The court observed that "the Privacy Act requires that an agency 'maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President.'" *Id.* at 794 (quoting 5 U.S.C. § 552a(e)(1)). The scope of Form 42's questions asking for information "bearing on this person's suitability for government employment or a security clearance" is similar to the release form in *American Federation of Government Employees*.

Finally, the panel concludes that the SF-85's request for disclosure of "any treatment or counseling received for illegal drug use would presumably lessen the government's concerns regarding the underlying activity," and thus, does not sufficiently demonstrate a legitimate state interest. *Nelson II*, 530 F.3d at 879. As discussed above, a government worker's drug use history cannot be kept from the government. *See Nat'l Treasury Employees Union*, 25 F.3d at 243. If a government worker's illegal drug use history is not entitled to constitutional protection, as the panel agrees, I do not see how a question regarding whether the applicant has received any treatment or counseling does not concern a legiti-

mate state interest, especially when it provides a more complete picture of an applicant's acknowledged drug use history. Of course, successful counseling might alleviate security concerns, but this supports rather than detracts from the inquiry's relevance and legitimacy. Given that the government may legitimately inquire as to an employee's illegal drug use, it makes little sense to prohibit the government from asking about an employee's treatment or counseling for drug use, which is necessary for a complete evaluation of the effect of the employee's drug use. The panel's opinion draws an arbitrary line, one which severely hampers the government's ability to secure its facilities.

III. Conclusion

The panel's opinion sharply curtails the degree to which the government can protect the safety and security of federal facilities. It significantly expands the constitutional right to informational privacy and puts the Ninth Circuit at odds with other circuits that have considered the right to informational privacy with respect to personnel background investigations. For these reasons, I respectfully dissent from the denial of rehearing en banc.

KLEINFELD, Circuit Judge, with whom CALLAHAN and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

I join in Judge Callahan's dissent from denial of rehearing en banc. Judge Callahan focuses on the drug treatment question and other inquiries to the applicant. I write to supplement her discussion of the other government conduct the panel held likely to be unconstitu-

tional—the inquiries to references, past employers, landlords, and schools.

The panel characterizes as "the most problematic aspect of the government's investigation—the open-ended Form 42 inquiries."[1] Almost 1,000,000 of these inquiries are sent out every year, not just for people applying for jobs at the Jet Propulsion Lab managing space missions and protecting national security on secret space matters, but also for most other government jobs.[2] The panel opinion is likely to impair national security by enjoining reasonable reference checks on applicants for federal government functions. The panel's injunction failed to consider this public interest factor, contrary to the Supreme Court's recent admonition that "*consideration of the public interest*" is mandatory "in assessing the propriety of any injunctive relief."[3]

The panel forbids the government from making the inquiries it has been making for decades, and from doing what any sensible private employer would do.[4] The pan-

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[1] *Nelson v. NASA*, 530 F.3d 865, 877 (9th Cir. 2008).

[2] *See* Exec. Order No. 10,450, § 3(a), 18 Fed. Reg. 2489 (Apr. 29, 1953), *reprinted as amended in* 5 U.S.C. § 7311 app. at 78 (2006) ("The appointment of each civilian officer or employee *in any department or agency of the Government* shall be made subject to. . . . [I]n no event shall the investigation include less than . . . written inquiries to . . . former employers and supervisors, references, and schools attended by the person under investigation.") (emphasis added); Submission for OMB Review, 70 Fed. Reg. 61,320, 61,320 (Oct. 21, 2005) ("Approximately 980,000 INV 42 inquiries are sent to individuals annually. The INV 42 takes approximately five minutes to complete.").

[3] *Winter v. NRDC*, — U.S. —, 129 S. Ct. 365, 381, 172 L. Ed. 2d 249 (2008), *rev'g* 518 F.3d 658 (9th Cir.) (emphasis added).

[4] Exec. Order No. 10,450, 18 Fed. Reg. 2489 (Apr. 29, 1953), *reprinted as amended in* 5 U.S.C. § 7311 app. at 77-80 (2006).

el's concern is that the "open-ended questions"—any adverse information regarding financial integrity, drug and alcohol abuse, mental and emotional stability, general behavior and conduct, and other matters—go beyond the government's legitimate security needs. The panel says that "highly personal information" is likely to come back when this form is sent to references, former employers, and landlords.[5] I disagree. What these categories of people know ought to be subject to inquiry.

First, what would references, past employers, and landlords know that is too "highly personal" for the government to know when it is hiring someone?[6] There is no citation for the panel's claim that "[t]he highly personal information that the government seeks to uncover through the Form 42 inquiries is protected by the right to privacy, whether it is obtained from third parties or from the applicant directly."[7] A landlord, unlike a doctor or lawyer, does not obtain genuinely private medical or legal confidences, after all. That is why past employers, unlike doctors or lawyers, have a privilege in defamation and invasion of privacy law.[8] A past employer can (and should) tell a prospective employer if the applicant stole money, came in late and hungover on Mondays, or wound up in jail after a drug bust, yet the ma-

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[5] *Nelson*, 530 F.3d at 879-82.

[6] *See United States v. Jacobsen*, 466 U.S. 109, 117, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984) ("[W]hen an individual reveals private information to another, he assumes the risk that his confidant will reveal that information. . . . ").

[7] *Nelson*, 530 F.3d at 880 n.5.

[8] *See* Restatement (Second) of Torts, § 652G (1977); *id.* § 595 cmt. i (noting conditional privilege to make a defamatory statement regarding former employee, despite any putative invasion of privacy).

jority would treat this as a secret not to be disclosed to the Jet Propulsion Lab or any government agency hiring for a civil service position.

Other circuits have rejected the panel's position. The District of Columbia Circuit held that collection of information does not raise the concerns that dissemination would, noting that "the employees could cite no case in which a court has found a violation of the constitutional right to privacy where the government has *collected*, but not *disseminated*, the information."[9] Likewise the Fifth Circuit.[10] This case concerns only collection of information, not dissemination.

The panel appears to be especially concerned with the "open-ended" inquiry into "any other adverse matters." The panel cites no authority, and gives no good reason, for rejecting these inquiries. When a prospective employer calls a past employer, it is exceedingly difficult to find out bad things, because people usually do not like to allege them without absolute proof (and because of potential liability and retaliation). The prospective employer does not know what bad things to ask about until something comes up in response to the open-ended questions. The prospective employer must smoke out negative information with open-ended broad questions and is lucky to get a glimmer. The answers to

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[9] *Am. Fed. of Gov't Employees v. HUD*, 118 F.3d 786, 793 (D.C. Cir. 1997) (emphasis added).

[10] *Nat'l Treasury Employees Union v. U.S. Dep't of Treasury*, 25 F.3d 237, 244 (5th Cir. 1994) ("[G]iven that the information collected by the questionnaire will not be *publicly disclosed*, we hold that the individual employees represented in the present case have no reasonable expectation that they can keep confidential from their government employer the information requested. . . . ") (emphasis added).

open-ended questions are not infrequently revelatory and surprising.[11]

Most of us do not hire law clerks and secretaries without talking to professors and past employers and asking some general questions about what they are like. It is hard to imagine an espresso stand hiring a barista without some open-ended questions to throw light on his reliability, honesty with cash, customer service, and ability to get along with coworkers and supervisors. I doubt if a person cleaning homes for a living hires an assistant without first finding out something about the assistant. Without open-ended questions, it is hard to know what potential problems might need an explanation. Of course some answers will be irrelevant or silly. But without the open-ended questions, any employer gets stuck with people who should not have been hired, and even, occasionally, people who are dangerous.

Under the panel opinion, our federal government cannot exercise the reasonable care an espresso stand or clothing store exercises when hiring. No revival of McCarthyism is threatened by allowing as much inquiry for hiring a Jet Propulsion Lab engineer as a barista.

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[11] None more so than *People v. Hill*, 70 Cal. 2d 678, 76 Cal. Rptr. 225, 452 P.2d 329, 337 (1969), where an interviewee answered the question "is there anything else you want to tell us" by admitting a previous burglary, which made him a suspect, later convicted, in a home-invasion murder. *See also* Shannon Dininny, *Washington Prepares for First Execution since 2001*, Associated Press, Mar. 9, 2009 (suspect in a California attempted murder answers the same question by admitting a murder in Washington, for which he was later convicted and currently faces the death penalty); *cf. United States v. King*, 34 C.M.R. 7, 9, 1963 WL 4749 (C.M.A. 1963) ("The Air Policeman 'more or less' found out 'what the story was' when he asked King if there was 'anything you want to tell me.'").

Chief Judge KOZINSKI, with whom Judges KLEINFELD and BEA join, dissenting from the denial of rehearing en banc:

Is there a constitutional right to informational privacy? Thirty-two Terms ago, the Supreme Court hinted that there might be and has never said another word about it. *See Whalen v. Roe*, 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) (alluding to "the individual interest in avoiding disclosure of personal matters"), and *Nixon v. Administrator of General Services*, 433 U.S. 425, 457, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977) (quoting the above phrase from *Whalen*). With no Supreme Court guidance except this opaque fragment, the courts of appeals have been left to develop the contours of this free-floating privacy guarantee on their own. It's a bit like building a dinosaur from a jawbone or a skull fragment, and the result looks more like a turducken. We have a grab-bag of cases on specific issues, but no theory as to what this right (if it exists) is all about. The result in each case seems to turn more on instinct than on any overarching principle.

One important function of the en banc process is to synthesize the accumulated experience of panels into firmer guideposts. We ought to have taken this case en banc for precisely that reason. Unless and until the Supreme Court again weighs in on this topic, only an en banc court can trim the hedges, correct what now appear to be missteps and give the force of law to those distinctions that experience has revealed to be important.

1. One such distinction is between mere government *collection* of information and the government's *disclo-*

sure of private information to the public. *Whalen* involved the latter: patients who feared public disclosure of their prescription records. Many of the cases in our circuit fall into this mold. In *Tucson Woman's Clinic v. Eden*, we held that women had a right not to have the government disclose their pregnancy records to a third-party contractor. 379 F.3d 531, 553 (9th Cir. 2004). *In re Crawford* featured a bankruptcy preparer who didn't want his Social Security number published. 194 F.3d 954 (9th Cir. 1999). But in other cases, such as the one now before us, we have sustained informational privacy claims without any allegations that the government might publish what it learned. *See, e.g., Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998).

The distinction matters. Government acquisition of information is already regulated by express constitutional provisions, particularly those in the Fourth, Fifth and Sixth Amendments. How can the creation of new constitutional constraints be squared with the teachings of *Medina v. California*, which cautioned against discovering protections in the Due Process Clause in areas where the "Bill of Rights speaks in explicit terms"? 505 U.S. 437, 443, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). Our cases, including this one, neither address nor acknowledge this problem. Yet limiting the government's ability to gather information has very serious implications, as Judge Callahan's dissent illustrates.

2. There's also an important distinction between disclosures that the target may refuse and those imposed regardless of his consent. The latter is inherently more invasive. *Nixon* is instructive: There, the former president was required by law to submit his papers for

screening by the National Archives. This requirement wasn't imposed as a condition on some benefit or job opportunity; rather, it was imposed outright under penalty of law. 433 U.S. at 429, 97 S. Ct. 2777. Though Nixon was unsuccessful, it wasn't because his claim wasn't found to be cognizable; the public interest was held to outweigh his privacy. In *Whalen*, the only way for the patients to avoid having their prescription records turned over was to give up needed pharmaceuticals. Our cases sometimes fit comfortably in this mold: What was so creepy about the medical tests in *Norman-Bloodsaw*, for example, was the sneaky way they were done without the subjects' knowledge or consent. 135 F.3d at 1269.

It strikes me as quite a different case when the government seeks to collect information directly from persons who are free to say no. The plaintiffs here had a simple way to keep their private dealings private: They could have declined to fill out the forms, provided no references and sought other employment. Does being asked to disclose information one would prefer to keep private, in order to keep a government job to which one has no particular entitlement, amount to a constitutional violation? If the answer is yes, then the government commits all manner of constitutional violations on tax returns, government contract bids, loan qualification forms, and thousands of job applications that are routinely filled out every day.

3. There is also a distinction, recognized by some of our sister circuits, between information that pertains to a fundamental right, such as the right to an abortion or contraception, *see, e.g., Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998), and a free-standing right not to have the world know bad things about you. The former kind of

right seems to stand on far sounder constitutional footing than the latter.

4. Consider also the contrast between investigating a subject by digging through his bank records or medical files, and contacting third parties to find out what they know about him. One's pregnancy status (perhaps known to no one), as in *Norman-Bloodsaw*, or the need for certain pharmaceuticals, as in *Whalen*, is private precisely because one has been careful not to disclose it. But one's privacy interest ought to wane the more widely the information is known. The Supreme Court has made a related point about the Fourth Amendment: Individuals lack a reasonable expectation of privacy in information that they share voluntarily with others. *See United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976).

Does one really have a free-standing constitutional right to withhold from the government information that others in the community are aware of? I don't think so. How then can it be constitutionally impermissible for the government to ask a subject's friends, family and neighbors what they know about him? Surely there's no constitutional right to have the state be the last to know.

5. A final distinction that emerges from the cases is between the government's different functions as enforcer of the laws and as employer. In *Whalen*, the government was acting as the former, collecting prescription records to aid later investigation of unlawful distribution. 429 U.S. at 591-92, 97 S. Ct. 869. Similarly, in *Tucson Woman's Clinic*, the government was ostensibly scooping up patient information to protect the public health. 379 F.3d at 536-37. Here, as Judge Kleinfeld illustrates in his dissent, the government is simply acting

as any other employer might: collecting information for its own purposes to make employment decisions.

If a right to informational privacy exists at all, *but see American Federation of Government Emp., AFL-CIO v. Department of Housing and Urban Development*, 118 F.3d 786, 791, 793 (D.C. Cir. 1997), it would be far more likely to apply when the government is exercising its sovereign authority than when it is monitoring its own employees.

While I can think of many reasons to worry when the government seeks to uncover private information using the special powers that private entities lack, it's far less obvious why it should be hamstrung in ensuring the security and integrity of its operations in ways that private employers are not. The delicate knowledge handled by thousands of federal employees seems as worthy of protection as the formula for Coca-Cola.

* * *

As we have recognized elsewhere, there are circumstances when a well-worn doctrine can grow into "a vexing thicket of precedent" that then becomes "difficult for litigants to follow and for district courts—and ourselves—to apply with consistency." *United States v. Heredia*, 483 F.3d 913, 919 (9th Cir. 2007) (en banc). The back-and-forth between the panel and my dissenting colleagues illustrates that we have reached this point with the doctrine of informational privacy. Though I am sympathetic to the arguments of my dissenting colleagues, it's not clear that the panel has misapplied circuit law; when the law is so subjective and amorphous, it's difficult to know exactly what a misapplication might look like.

It's time to clear the brush. An en banc court is the only practical way we have to do it. We didn't undertake that chore today, but we'll have to sooner or later, unless the Supreme Court should intervene.

APPENDIX F

The Privacy Act, 5 U.S.C. 552a, provides, in pertinent part:

Records maintained on individuals

(a) Definitions.—For purposes of this section—

* * * * *

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

* * * * *

(b) Conditions of disclosure.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is

transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

* * * * *

(d) Access to records.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

* * * * *

(f) Agency rules.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

* * * * *

Standard Form 85
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731 and 736

Form approved:
OMB No. 3206-0005
NSN 7540-00-634-4035
85-111

Questionnaire for Non-Sensitive Positions

Follow instructions fully or we cannot process your form. Be sure to sign and date the certification statement on Page 5 and the release on Page 6. If you have any questions, call the office that gave you the form.

Purpose of this Form

The U.S. Government conducts background investigations to establish that applicants or incumbents either employed by the Government or working for the Government under contract, are suitable for the job. Information from this form is used primarily as the basis for this investigation. Complete this form only after a conditional offer of employment has been made.

Giving us the information we ask for is voluntary. However, we may not be able to complete your investigation, or complete it in a timely manner, if you don't give us each item of information we request. This may affect your placement or employment prospects.

Authority to Request this Information

The U.S. Government is authorized to ask for this information under Executive Order 10577, sections 3301 and 3302 of title 5, U.S. Code; and parts 5, 731, and 736 of Title 5, Code of Federal Regulations.

Your Social Security Number is needed to keep records accurate, because other people may have the same name and birth date. Executive Order 9397 also asks Federal agencies to use this number to help identify individuals in agency records.

The Investigative Process

Background investigations are conducted using your responses on this form and on your Declaration for Federal Employment (OF 306) to develop information to show whether you are reliable, trustworthy, and of good conduct and character. Your current employer must be contacted as part of the investigation, even if you have previously indicated on applications or other forms that you do not want this.

Instructions for Completing this Form

1. Follow the instructions given to you by the person who gave you the form and any other clarifying instructions furnished by that person to assist you in completion of the form. Find out how many copies of the form you are to turn in. You must sign and date, in black ink, the original and each copy you submit.

2. Type or legibly print your answers in black ink (if your form is not legible, it will not be accepted). You may also be asked to submit your form in an approved electronic format.

3. All questions on this form must be answered. If no response is necessary or applicable, indicate this on the form (for example, enter "None" or "N/A"). If you find that you cannot report an exact date, approximate or estimate the date to the best of your ability and indicate this by marking "APPROX." or "EST."

4. Any changes that you make to this form after you sign it must be initialed and dated by you. Under certain limited circumstances, agencies may modify the form consistent with your intent.

5. You must use the State codes (abbreviations) listed on the back of this page when you fill out this form. Do not abbreviate the names of cities or foreign countries.

6. The 5-digit postal ZIP codes are needed to speed the processing of your investigation. The office that provided the form will assist you in completing the ZIP codes.

7. All telephone numbers must include area codes.

8. All dates provided on this form must be in Month/Day/Year or Month/Year format. Use numbers (1-12) to indicate months. For example, June 10, 1978, should be shown as 6/10/78.

9. Whenever "City (Country)" is shown in an address block, also provide in that block the name of the country when the address is outside the United States.

10. If you need additional space to list your residences or employments/self-employments/unemployment or education, you should use a continuation sheet, SF 86A. If additional space is needed to answer other items, use a blank piece of paper. Each blank piece of paper you use must contain your name and Social Security Number at the top of the page.

BEST AVAILABLE COPY

Final Determination on Your Eligibility

Final determination on your eligibility for a position is the responsibility of the Office of Personnel Management or the Federal agency that requested your investigation. You may be provided the opportunity personally to explain, refute, or clarify any information before a final decision is made.

Penalties for Inaccurate or False Statements

The U.S. Criminal Code (title 18, section 1001) provides that knowingly falsifying or concealing a material fact is a felony which may result in fines of up to $10,000, and/or 5 years imprisonment, or both. In addition, Federal agencies generally fire, or disqualify individuals who have materially and deliberately falsified these forms, and this remains a part of the permanent record for future placements. Your trustworthiness is a very important consideration in deciding your suitability. Your prospects of placement are better if you answer all questions truthfully and completely. You will have adequate opportunity to explain any information you give us on the form and to make your comments part of the record.

Disclosure of Information

The information you give us is for the purpose of determining your suitability for Federal employment; we will protect it from unauthorized disclosure. The collection, maintenance, and disclosure of background investigative information is governed by the Privacy Act. The agency which requested the investigation and the agency which conducted the investigation have published notices in the Federal Register describing the systems of records in which your records will be maintained. You may obtain copies of the relevant notices from the person who gave you this form. The information on this form, and information we collect during an investigation may be disclosed without your consent as permitted by the Privacy Act (5 USC 552a(b)) and as follows:

138a

PRIVACY ACT ROUTINE USES

1. To the Department of Justice when: (a) the agency or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States Government, is a party to litigation or has interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records by the Department of Justice is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

2. To a court or adjudicative body in a proceeding when: (a) the agency or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States Government is a party to litigation or has interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

3. Except as noted in Question 14, when a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute, particular program statute, regulation, rule, or order issued pursuant thereto, the relevant records may be disclosed to the appropriate Federal, foreign, State, local, tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order.

4. To any source or potential source from which information is requested in the course of an investigation concerning the hiring or retention of an employee or other personnel action, or the issuing or retention of a security clearance, contract, grant, license, or other benefit, to the extent necessary to identify the individual, inform the source of the nature and purpose of the investigation, and to identify the type of information requested.

5. To a Federal, State, local, foreign, tribal, or other public authority the fact that this system of records contains information relevant to the retention of an employee, or the retention of a security clearance, contract, license, grant, or other benefit. The other agency or licensing organization may then make a request supported by written consent of the individual for the entire record if it so chooses. No disclosure will be made unless the information has been determined to be sufficiently reliable to support a referral to another office within the agency or to another Federal agency for criminal, civil, administrative, personnel, or regulatory action.

6. To contractors, grantees, experts, consultants, or volunteers when necessary to perform a function or service related to this record for which they have been engaged. Such recipients shall be required to comply with the Privacy Act of 1974, as amended.

7. To the news media or the general public, factual information the disclosure of which would be in the public interest and which would not constitute an unwarranted invasion of personal privacy.

8. To a Federal, State, or local agency, or other appropriate entities or individuals, or through established liaison channels to selected foreign governments, in order to enable an intelligence agency to carry out its responsibilities under the National Security Act of 1947 as amended, the CIA Act of 1949 as amended, Executive Order 12333 or any successor order, applicable national security directives, or classified implementing procedures approved by the Attorney General and promulgated pursuant to such statutes, orders or directives.

9. To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

10. To the National Archives and Records Administration for records management inspections conducted under 44 USC 2904 and 2906.

11. To the Office of Management and Budget when necessary to the review of private relief legislation.

STATE CODES (ABBREVIATIONS)

Alabama	AL	Hawaii	HI	Massachusetts	MA	New Mexico	NM	South Dakota	SD
Alaska	AK	Idaho	ID	Michigan	MI	New York	NY	Tennessee	TN
Arizona	AZ	Illinois	IL	Minnesota	MN	North Carolina	NC	Texas	TX
Arkansas	AR	Indiana	IN	Mississippi	MS	North Dakota	ND	Utah	UT
California	CA	Iowa	IA	Missouri	MO	Ohio	OH	Vermont	VT
Colorado	CO	Kansas	KS	Montana	MT	Oklahoma	OK	Virginia	VA
Connecticut	CT	Kentucky	KY	Nebraska	NE	Oregon	OR	Washington	WA
Delaware	DE	Louisiana	LA	Nevada	NV	Pennsylvania	PA	West Virginia	WV
Florida	FL	Maine	ME	New Hampshire	NH	Rhode Island	RI	Wisconsin	WI
Georgia	GA	Maryland	MD	New Jersey	NJ	South Carolina	SC	Wyoming	WY
American Samoa	AS	District of Columbia	DC	Guam	GU	Northern Marianas	CM	Puerto Rico	PR
Trust Territory	TT	Virgin Islands	VI						

PUBLIC BURDEN INFORMATION

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Reports and Forms Management Officer, U.S. Office of Personnel Management, 1900 E Street, N.W., Room CHP-500, Washington, D.C. 20415. Do not send your completed form to this address.

Standard Form 85 (EG)
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731 and 736

QUESTIONNAIRE FOR NON-SENSITIVE POSITIONS

Form approved:
OMB No. 3206-0005
NSN 7540-00-634-4035
85-111

OPM USE ONLY — Codes — Case Number

Agency Use Only (Complete items A through K as specified by your agency)

A Type of Investigation	B Extra Coverage	C Nature of Action Code	D Date of Action: Month / Day / Year
E Geographic Location	F Position Title	G SON	H SOI
I OPAC-ALC Number	J Accounting Data and/or Agency Case Number		
K Requesting Official: Name and Title	Signature	Telephone Number ( )	Date

Persons completing this form should begin with the questions below.

1 FULL NAME • If you have only initials in your name, use them and state (IO). • If you have no middle name, enter "NMN". - If you are a "Jr.," "Sr.," "II," etc., enter this in the box after your middle name.

2 DATE OF BIRTH

Last Name	First Name	Middle Name	Jr., II, etc.	Month	Day	Year

3 PLACE OF BIRTH - Use the two letter code for the State.

City	County	State	Country (If not in the United States)

4 SOCIAL SECURITY

5 OTHER NAMES USED
Give other names you used and the period of time you used them (for example: your maiden name, name(s) by a former marriage, former name(s), alias(es), or nickname(s)). If the other name is your maiden name, put "nee" in front of it.

Name	Month/Year	Month/Year
#1		To
#2		To
#3		To
#4		To

6 SEX (Mark one box) Female ☐ Male ☐

7 CITIZENSHIP

8 Mark the box at the right that reflects your current citizenship status, and follow its instructions.

- ☐ I am a U.S. citizen or national by birth in the U.S. or U.S. territory/possession. (Answer items b and d)
- ☐ I am a U.S. citizen, but I was NOT born in the U.S. (Answer items b, c and d)
- ☐ I am not a U.S. citizen. (Answer items b and e)

9 Your Mother's Maiden Name

10 UNITED STATES CITIZENSHIP If you are a U.S. citizen, but were not born in the U.S., provide information about one or more of the following proofs of your citizenship.

Naturalization Certificate (Where were you naturalized?)

Court	City	State	Certificate Number	Month/Day/Year Issued

Citizenship Certificate (Where was the certificate issued?)

City	State	Certificate Number	Month/Day/Year Issued

State Department Form 240 - Report of Birth Abroad of a Citizen of the United States

Give the date the form was prepared and give an explanation if needed	Month/Day/Year	Explanation

U.S. Passport

This may be either a current or previous U.S. Passport.	Passport Number	Month/Day/Year Issued

11 DUAL CITIZENSHIP If you are (or were) a dual citizen of the United States and another country, provide the name of that country in the space to the right. Country:

12 ALIEN If you are an alien, provide the following information:

Place You Entered the United States:	City	State	Date You Entered U.S. Month	Day	Year	Alien Registration Number	Country(ies) of Citizenship

Exceptions to SF86, SF86P, SF86P-S, SF86I, and SF86A approved by OSA September, 1995.
Designed using Perform Pro, WHSD/OR, Sep 95

1998

8 WHERE YOU HAVE LIVED

List the places where you have lived, beginning with the most recent (#1) and working back 5 years. All periods must be accounted for in your list. Be sure to indicate the actual physical location of your residence: do not use a post office box as an address, do not list a permanent address when you were actually living at a school address, etc. Be sure to specify your location as closely as possible: for example, do not list only your base or ship, list your barracks number or home port. You may omit temporary military duty locations under 90 days (list your permanent address instead), and you should use your APO/FPO address if you lived overseas.

For any address in the last 3 years, list a person who knew you at that address, and who preferably still lives in that area (do not list people for residences completely outside this 3-year period, and do not list your spouse, former spouses, or other relatives).

#1 Month/Year To Present	Street Address	Apt. #	City (Country)		State	ZIP Code
Name of Person Who Knows You	Street Address	Apt. #	City (Country)		State	ZIP Code
#2 Month/Year To Month/Year	Street Address	Apt. #	City (Country)		State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)		State	ZIP Code
#3 Month/Year To Month/Year	Street Address	Apt. #	City (Country)		State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)		State	ZIP Code
#4 Month/Year To Month/Year	Street Address	Apt. #	City (Country)		State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)		State	ZIP Code
#5 Month/Year To Month/Year	Street Address	Apt. #	City (Country)		State	ZIP Code
Name of Person Who Knew You	Street Address	Apt. #	City (Country)		State	ZIP Code

9 WHERE YOU WENT TO SCHOOL

List the schools you have attended, beyond Junior High School, beginning with the most recent (#1) and working back 5 years. List all College or University degrees and the dates they were received. If all of your education occurred more than 5 years ago, list your most recent education beyond High school, no matter when that education occurred.

- Use one of the following codes in the "Code" block:

1 - High School 2 - College/University/Military College 3 - Vocational/Technical/Trade School

- For correspondence schools and extension classes, provide the address where the records are maintained.

#1 Month/Year To Month/Year	Code	Name of School	Degree/Diploma/Other		Month/Year Awarded
Street Address and City (Country) of School				State	ZIP Code
#2 Month/Year To Month/Year	Code	Name of School	Degree/Diploma/Other		Month/Year Awarded
Street Address and City (Country) of School				State	ZIP Code
#3 Month/Year To Month/Year	Code	Name of School	Degree/Diploma/Other		Month/Year Awarded
Street Address and City (Country) of School				State	ZIP Code

Enter your Social Security Number before going to the next page →

13 YOUR EMPLOYMENT ACTIVITIES

List your employment activities, beginning with the present (#1) and working back 5 years. You should list all full-time work, part-time work, military service, temporary military duty locations over 90 days, self-employment, other paid work, and all periods of unemployment. The entire 5-year period must be accounted for without breaks, but you need not list employments before your 16th birthday.

Code. Use one of the codes listed below to identify the type of employment:

1 - Active military duty stations
2 - National Guard/Reserve
3 - U.S.P.H.S. Commissioned Corps
4 - Other Federal employment
5 - State Government (Non-Federal employment)
6 - Self-employment (include business name and/or name of person who can verify)
7 - Unemployment (include name of person who can verify)
8 - Federal Contractor (List Contractor, not Federal agency)
9 - Other

Employer/Verifier Name. List the business name of your employer or the name of the person who can verify your self-employment or unemployment in this block. If military service is being listed, include your duty location or home port here as well as your branch of service. You should provide separate listings to reflect changes in your military duty locations or home ports.

Previous Periods of Activity. Complete these lines if you worked for an employer on more than one occasion at the same location. After entering the most recent period of employment in the initial numbered block, provide previous periods of employment at the same location on the additional lines provided. For example, if you worked at XY Plumbing in Denver, CO, during 3 separate periods of time, you would enter dates and information concerning the most recent period of employment first, and provide dates, position titles, and supervisors for the two previous periods of employment on the lines below that information.

1413

Month/Year Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#1 To Present			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (If different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (If different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY (Block #1)	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor

Month/Year Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#2 To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (If different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (If different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY (Block #2)	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor

Month/Year Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#3 To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (If different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (If different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY (Block #3)	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor

Enter your Social Security Number before going to the next page →

YOUR EMPLOYMENT ACTIVITIES *(CONTINUED)*

Month/Year Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#4 To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (If different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (If different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY *(Block #4)*	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor

Month/Year Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#5 To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (If different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (If different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY *(Block #5)*	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor

Month/Year Month/Year	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#6 To			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number
				( )
Street Address of Job Location (If different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number
				( )
Supervisor's Name & Street Address (If different than Job Location)	City (Country)	State	ZIP Code	Telephone Number
				( )

PREVIOUS PERIODS OF ACTIVITY *(Block #6)*	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor

13 PEOPLE WHO KNOW YOU WELL

List three people who know you well and live in the United States. They should be good friends, peers, colleagues, college roommates, etc., whose combined association with you covers as well as possible the last 5 years. Do not list your spouse, former spouse, or other relatives, and try not to list anyone who is listed elsewhere on this form.

Name	Dates Known Month/Year Month/Year To	Telephone Number Day ( ) Night ( )
#1		
Home or Work Address	City (Country)	State / ZIP Code
Name	Dates Known Month/Year Month/Year To	Telephone Number Day ( ) Night ( )
#2		
Home or Work Address	City (Country)	State / ZIP Code
Name	Dates Known Month/Year Month/Year To	Telephone Number Day ( ) Night ( )
#3		
Home or Work Address	City (Country)	State / ZIP Code

Enter your Social Security Number before going to the next page →

12 YOUR SELECTIVE SERVICE RECORD

	Yes	No
a. Are you a male born after December 31, 1959? If "No," go to 13. If "Yes," go to b.		
b. Have you registered with the Selective Service System? If "Yes," provide your registration number. If "No," show the reason for your legal exemption below.		

Registration Number

Legal Exemption Explanation

13 YOUR MILITARY HISTORY

	Yes	No
a. Have you served in the United States military?		
b. Have you served in the United States Merchant Marine?		

List all of your military service below, including service in Reserve, National Guard, and U.S. Merchant Marine. Start with the most recent period of service (#1) and work backward. If you had a break in service, each separate period should be listed.

Code. Use one of the codes listed below to identify your branch of service:

1 - Air Force 2 - Army 3 - Navy 4 - Marine Corps 5 - Coast Guard 6 - Merchant Marine 7 - National Guard

OR. Mark "O" block for Officer or "E" block for Enlisted.

Status. "X" the appropriate block for the status of your service during the time that you served. If your service was in the National Guard, do not use an "X"; use the two-letter code for the state to mark the block.

Country. If your service was with other than the U.S. Armed Forces, identify the country for which you served.

Month/Year	Month/Year	Code	Service/Certificate #	O	E	Status				Country
						Active	Active Reserve	Inactive Reserve	National Guard (State)	
	To									
	To									

14 ILLEGAL DRUGS

	Yes	No
In the last year, have you used, possessed, supplied, or manufactured illegal drugs? When used without a prescription, illegal drugs include marijuana, cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), stimulants (cocaine, amphetamines, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.). (NOTE: Neither your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding.)		

If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs. Include any treatment or counseling received.

Month/Year	Month/Year	Type of Substance	Explanation
	To		
	To		
	To		

Continued Block

Use the continuation sheet(s) (SF86A) for additional answers to items 8, 9, and 10. Use the space below to continue answers to all other items and any information you would like to add. If more space is needed than is provided below, use a blank sheet(s) of paper. Start each sheet with your name and Social Security number. Before each answer, identify the number of the item.

After completing this form you should review your answers to all questions to make sure the form is complete and accurate, and then sign and date the following certification and sign and date the release on Page 6.

Certification That My Answers Are True

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code).

Signature *(Sign in ink)*

Date

Enter your Social Security Number before going to the next page →

Standard Form 85
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731 and 736

Form approved:
OMB No. 3206-0005
NSN 7540-00-634-4035
85-111

UNITED STATES OF AMERICA

AUTHORIZATION FOR RELEASE OF INFORMATION

Carefully read this authorization to release information about you, then sign and date it in black ink.

1448

I Authorize any investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information. This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information.

I Understand that, for some sources of information, a separate specific release will be needed, and I may be contacted for such a release at a later date.

I Authorize custodians of records and sources of information pertaining to me to release such information upon request of the investigator, special agent, or other duly accredited representative of any Federal agency authorized above regardless of any previous agreement to the contrary.

I Understand that the information released by records custodians and sources of information is for official use by the Federal Government only for the purposes provided in this Standard Form 85, and may be redisclosed by the Government only as authorized by law.

Copies of this authorization that show my signature are as valid as the original release signed by me. This authorization is valid for two (2) years from the date signed.

Signature *(Sign in ink)*	Full Name *(Type or Print Legibly)*		Date Signed
Other Names Used			Social Security Number
Current Address *(Street, City)*	State	ZIP Code	Home Telephone Number *(Include Area Code)*
			( )

INV FORM 42 (Rev. 6/05)
U.S. OFFICE OF PERSONNEL MANAGEMENT (5 CFR 736)

INVESTIGATIVE REQUEST FOR PERSONAL INFORMATION

U.S. GOVERNMENT USE ONLY

FROM
UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
FEDERAL INVESTIGATIONS PROCESSING CENTER
PO BOX 618
BOYERS, PA 16018-0618

TO

145a

INSTRUCTIONS: Your name has been provided by the person identified below to assist in completing a background investigation to help us determine this person's suitability for employment or security clearance. To help us make this determination, we ask that you complete all items on the back of this form and return the form in the enclosed envelope. You were listed as:

PRIVACY ACT INFORMATION: This investigative inquiry is in full compliance with the Privacy Act of 1974 and other laws protecting the civil rights of the person we are investigating. The information you provide, including your identity, will be disclosed to the person being investigated and other federal agencies, at this person's request.

CERTIFICATION: The person we are investigating has given written consent for this investigative inquiry. We keep that consent on file. If a copy is required in order to complete this form, or you would like to keep your identity confidential, please indicate this requirement in writing on the reverse.

Completion of this investigation as soon as possible will help this person and the agency perform their duties in a more timely and efficient manner.

CASE NUMBER: CASE TYPE: ITEM NUMBER:

FULL NAME (LAST, FIRST, MIDDLE)
OTHER NAMES USED
POSITION FOR WHICH INVESTIGATED
THIS PERSON CLAIMED THE FOLLOWING:

PUBLIC BURDEN INFORMATION: We estimate the Public Burden for this collection of information is approximately 5 minutes per response. This includes time for reviewing the instructions, gathering the information requested, and completing and returning the form. You may send comments regarding our estimate or any other aspect of this form, including suggestions for reducing completion time, to the Office of Personnel Management, Forms Officer, Paperwork Reduction Act (3206-0185), Washington, DC 20415-7900. The OMB Number 3206-0185 is currently valid. OPM may not collect this information, and you are not required to respond, unless this number is displayed. Do not send your completed form to this address.

U.S. GOVERNMENT PRINTING OFFICE:1997-582-419/32583 221459-4

FORM APPROVED: OMB:3206-0185

MARKING INSTRUCTIONS

CORRECT MARK: ●

- USE A NO. 2 PENCIL OR BLUE OR BLACK INK PEN ONLY.
- DO NOT USE PENS WITH INK THAT SOAKS THROUGH THE PAPER.
- DO NOT MAKE ANY STRAY MARKS ON THIS SHEET.

INCORRECT MARKS: ✗ ✓ ⊃ ⊂

PLEASE COMPLETE THE ITEMS SHOWN BELOW

1 HOW LONG HAVE YOU KNOWN THIS PERSON?

a ___ ___ YEARS ___ MONTHS b I DON'T KNOW THIS PERSON (DON'T COMPLETE OTHER ITEMS)

2 MY ASSOCIATION WITH THIS PERSON IS/WAS AS A:

a COWORKER c FRIEND e FORMER SPOUSE g RELATIVE
b NEIGHBOR d SPOUSE f INSTRUCTOR h OTHER (PLEASE EXPLAIN IN ITEM 9)

3 ON THE AVERAGE, I ASSOCIATE(D) WITH THIS PERSON:

a DAILY c MONTHLY e ONCE EVERY YEAR OR 2
b WEEKLY d TWICE A YEAR f ONCE IN 3 OR MORE YEARS

4 I LAST ASSOCIATED WITH THIS PERSON:

a 0 TO 3 MONTHS AGO c 1 TO 3 YEARS AGO e MORE THAN 5 YEARS AGO
b 3 TO 12 MONTHS AGO d 3 TO 5 YEARS AGO

5 DOES THE INFORMATION ON THE FRONT OF THIS FORM CONCERNING THIS PERSON APPEAR TO BE CORRECT?

a YES b NO—IT APPEARS TO BE INCORRECT OR INCOMPLETE (SHOW CORRECT OR ADDITIONAL DATA IN ITEM 9)

6 DO YOU HAVE ANY REASON TO QUESTION THIS PERSON'S HONESTY OR TRUSTWORTHINESS?

a NO c I DO NOT KNOW THIS PERSON WELL ENOUGH TO RESPOND
b YES (PLEASE EXPLAIN IN ITEM 9) d I WISH TO DISCUSS THE ADVERSE INFORMATION I HAVE

7 DO YOU HAVE ANY ADVERSE INFORMATION ABOUT THIS PERSON'S EMPLOYMENT, RESIDENCE OR ACTIVITIES CONCERNING:

	YES	NO		YES	NO		YES	NO
a			VIOLATIONS OF THE LAW			c ABUSE OF ALCOHOL AND/OR DRUGS			e GENERAL BEHAVIOR OR CONDUCT
b			FINANCIAL INTEGRITY			d MENTAL OR EMOTIONAL STABILITY			f OTHER MATTERS

(IF YES, PLEASE EXPLAIN IN ITEM 9)

I WISH TO DISCUSS THE ADVERSE INFORMATION I HAVE

8 IF ADDITIONAL INFORMATION IS PROVIDED BELOW, YOU MUST FILL IN THIS MARK.

ADDITIONAL INFORMATION WHICH YOU FEEL MAY HAVE A BEARING ON THIS PERSON'S SUITABILITY FOR GOVERNMENT EMPLOYMENT OR A SECURITY CLEARANCE. THIS SPACE MAY BE USED FOR DEROGATORY AS WELL AS POSITIVE INFORMATION.

9 DO YOU RECOMMEND THIS PERSON FOR GOVERNMENT SECURITY CLEARANCE OR EMPLOYMENT?

a YES c I DON'T KNOW THIS PERSON WELL ENOUGH TO MAKE A RECOMMENDATION
b NO (PLEASE EXPLAIN IN ITEM 9)

PRINT NAME:

PLEASE SIGN THIS FORM HERE: DATE

YOUR TITLE: DAYTIME TELEPHONE NUMBER

(INCLUDE AREA CODE)

FOR OPM USE ONLY

RESULTS

AC	ACCEPTABLE	IS	ISSUES
AT	ACCEPTABLE/ATTACHED	CI	CONFIDENTIAL/ISSUES
CA	CONFIDENTIAL/ACCEPTABLE	RI	RECORD INCONCLUSIVE
NI	NO PERTINENT INFORMATION	FR	FEE REQUIRED
NR	NO RECORD	RL	RELEASE REQUIRED
NL	NOT LOCATED	SU	SUBJECT UNKNOWN
UC	UNABLE TO CONTACT	NA	NOT AVAILABLE
RF	REFERRED	DS	DISCREPANT
RT	RECORD		

ISSUES/CHARACTERIZATION

1	O	A	B	C	D	E	M	9	O	A	B	C	D	E
2	O	A	B	C	D	E	M	10	O	A	B	C	D	E
3	O	A	B	C	D	E	M	11	O	A	B	C	D	E
4	O	A	B	C	D	E	M	12	O	A	B	C	D	E
5	O	A	B	C	D	E	M	13	O	A	B	C	D	E
6	O	A	B	C	D	E	M	14	O	A	B	C	D	E
7	O	A	B	C	D	E	M							
8	O	A	B	C	D	E	M							

146a

OPPOSITION BRIEF

Supreme Court, U.S.
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No. 09-530

IN THE

Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, *et al.*,

Petitioners,

v.

ROBERT M. NELSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded, based on the as-yet undeveloped factual record before it, that a preliminary injunction was warranted because "serious questions" regarding respondents' informational privacy claim were raised by NASA's decision to institute—for the first time in more than 50 years—background investigations of low-risk, long-time employees of the California Institute of Technology (which operates the Jet Propulsion Laboratory under a contract with NASA), including investigation regarding medical treatment or counseling for drug use and any "adverse" information about the employee, which could include investigation into private sexual matters.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

A. Factual Background 2

B. Procedural Background 8

REASONS FOR DENYING THE PETITION 12

I. THE COURT OF APPEALS' INTERLOCUTORY DECISION IS OF LIMITED SIGNIFICANCE 13

II. THE DECISION BELOW IS CORRECT 17

III. THE GOVERNMENT'S REASONS FOR GRANTING CERTIORARI LACK MERIT 21

A. The Decision Below Does Not Conflict With This Court's Precedent 21

B. The Decision Below Does Not Create A Circuit Conflict 23

C. The Government's Remaining Arguments Lack Merit 25

CONCLUSION 28

APPENDIX

Homeland Security Presidential Directive/HSPD-12—Policy For A Common Identification Standard For Federal Employees And Contractors, 2 Pub. Papers 1765-1767 (Aug. 27, 2004) 1a

Issue Characterization Chart 4a

TABLE OF AUTHORITIES

CASES

Page(s)

American Federation of Government Employees v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997) 23, 24

Board of County Commissioners v. *Umbehr*, 518 U.S. 668 (1996) 26

Butler v. *Curry*, 528 F.3d 624 (9th Cir. 2008) 18

In re Crawford, 194 F.3d 954 (9th Cir. 1999) 18, 26

FW/PBS, Inc. v. *City of Dallas*, 493 U.S. 215 (1990) 18

Garcetti v. *Ceballos*, 547 U.S. 410 (2006) 27

Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 13

Legal Services Corp. v. *Velasquez*, 531 U.S. 533 (2001) 14

Mazurek v. *Armstrong*, 520 U.S. 968 (1997) 14

McCreary County v. *ACLU of Kentucky*, 545 U.S. 844 (2005) 14

National Treasury Employees Union v. *U.S. Department of Treasury*, 25 F.3d 237 (5th Cir. 1994) 23, 24

National Treasury Employees Union v. *U.S. Department of Treasury*, 838 F. Supp. 631 (D.D.C. 1993) 25

Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977) 10, 17, 21, 22, 27

Norman-Bloodsaw v. *Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998) 26

TABLE OF AUTHORITIES—Continued

Page(s)

Public Service Commission of Wisconsin v. *Wisconsin Telephone Co.*, 289 U.S. 67 (1933) 13

Rumsfeld v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) 14

Thorne v. *City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) 26

University of Texas v. *Camenisch*, 451 U.S. 390 (1981) 13

Virginia Military Institute v. *United States*, 508 U.S. 946 (1993) 13

Whalen v. *Roe*, 429 U.S. 589 (1977) 10, 17, 18, 22

Wieman v. *Updegraff*, 344 U.S. 183 (1952) 26

Winter v. *Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008) 9

STATUTES AND REGULATIONS

5 U.S.C. § 552a 22

5 C.F.R.
§ 731.103 7
§ 731.106 3

OTHER AUTHORITIES

Gressman, Eugene, et al., *Supreme Court Practice* (9th ed. 2007) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Homeland Security Presidential Directive/HSPD-12—Policy for a Common Identification Standard for Federal Employees and Contractors, 2 Pub. Papers (Aug. 27, 2004).....5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

This case arises from NASA's decision to institute background investigations for employees of the California Institute of Technology (Caltech) who currently work at the Jet Propulsion Laboratory (JPL). Respondents are long-time employees of Caltech at JPL and are required to submit to this background investigation or else lose their jobs. Respondents challenged the legality of the background investigation, arguing that it violates their constitutional right to informational privacy. The Ninth Circuit issued a preliminary injunction, concluding that, on the limited record before it, respondents had raised "serious questions" going to the

merits of their informational privacy claim and that the balance of hardships strongly favored respondents.

That decision does not warrant this Court's review. The Ninth Circuit's decision is interlocutory, and it made no final decision on the merits of respondents' informational privacy claim. To the contrary, the Ninth Circuit has simply made a preliminary ruling, which reflects (a) the indisputably severe hardship to respondents of losing their jobs (which some have held for decades) if they do not submit to the investigation into them that the government suddenly wants to undertake, and (b) the current, undeveloped state of the record on the merits—and in particular, the government's failure, in the lower courts, to offer a justification for carrying out an unbounded investigation that could reach into respondents' private lives. That decision is correct and does not conflict with any decision of this Court or any other court.

A. Factual Background

1. Respondents are 28 scientists, engineers, and administrative personnel who work at JPL. Pet. App. 56a. They are not employees of the federal government, and they are not job applicants. They are employees of Caltech, and many of them have been employed by Caltech at JPL for more than 20 years. *Id.* They are considered "low-risk" employees, and they do not work on projects that are classified or otherwise restricted from the public. *Id.* at 3a. In fact, many of them chose to work at JPL precisely because it offers a research environment where their work is in the public domain. *E.g.*, C.A. App. 1391. Consequently, their

work is largely theoretical or research-oriented,[1] and they are part of the wider academic and scientific community, collaborating with other scientists and engineers around the world, publishing in peer-reviewed journals, and teaching at universities, *e.g.*, *id.* at 1359.

JPL, which is NASA's laboratory for robotic spacecraft, is operated by Caltech pursuant to a contract with NASA. Pet. App. 3a; C.A. App. 470, 765. JPL has a distinct identity reflecting its mission and culture. It operates as a division of Caltech, which hires and provides all of JPL's employees. Pet. App. 56a. As such, "JPL has always operated more as a university campus type environment than as a high-security government facility." C.A. App. 145. It is located on an open campus, has limited security precautions, and welcomes outside visitors. *Id.* Furthermore, none of the robotics research at JPL is classified, and unlike the other nine NASA centers around the country, JPL has no NASA employees at all. *Id.* at 470, 735.

Because of the nature of respondents' work, NASA has classified them as "low risk."[2] Pet. App. 3a. That means that, in NASA's own judgment, even if respon-

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[1] Most of them have advanced degrees in fields such as astronomy, electrical engineering, computer science, and physics (*e.g.*, C.A. App. 1218, 1388, 1417, 1438), and their work covers subjects such as quantum fluids, planetary geology, and applied mathematics (*e.g.*, *id.* at 1287, 1406, 1413).

[2] Federal agencies classify positions as low, moderate, or high risk. *See* 5 C.F.R. § 731.106(a). Positions at the high or moderate level are normally designated as "public trust" positions. *Id.* § 731.106(b). NASA has classified the vast majority (more than 97 percent) of JPL's 5,000 employees as "low risk." C.A. App. 735. All of the respondents here are classified by NASA as "low risk."

dents "misused" their responsibilities or authorities at JPL, it would have "limited or no adverse impact on the Agency's mission." C.A. App. 587. Much of respondents' work, for example, involves mathematical analysis of data or theoretical calculations, using software in the public domain, and requiring nothing more than "a desk, a computer, a pencil, a sheet of paper, and a calculator." *Id.* at 1434.

2. Respondents, like all those who work at JPL, were hired by Caltech and were vetted by Caltech for initial employment through standard criminal background checks and employment reference checks. *E.g.*, Pet. App. 79a; C.A. App. 1397. For the more than 50 years that Caltech has operated JPL, NASA has never required any additional background checks on JPL employees such as the ones that respondents challenge here. Pet. App. 5a. NASA has never suggested in this case that additional background investigations into Caltech employees at JPL were necessary because of any risk of harm to NASA's operations created by any JPL employee. Nor has NASA suggested in this case that the standard background check carried out by Caltech into applicants for employment at JPL had failed to identify any individual who posed a risk to NASA or was otherwise unsuitable.

Recently, however, NASA decided to institute its own, additional background investigations of its contract employees. Specifically, NASA decided to require contract employees of JPL (including persons who had been employed there for decades) to undergo the National Agency Check with Inquiries (NACI), which is the background check used for federal civil service employees. Pet. App. 5a. NASA implemented the change at JPL in 2007, when it unilaterally modified its contract with Caltech—over Caltech's opposition—to re-

quire all JPL employees to undergo the NACI. *Id.* at 3a, 5a. Employees who do not complete the NACI "would be deemed to have voluntarily resigned their Caltech employment." *Id.* at 6a.

Contrary to the government's suggestions, there is no requirement that federal agencies conduct NACI background investigations of contract employees. The government's petition mistakenly states (Pet. 2, 6-8, 24) that NASA imposed the NACI on contract employees to comply with a presidential directive that requires federal agencies to adopt a uniform standard of identification for civil service and contract employees who have access to federal facilities. *See Homeland Security Presidential Directive/HSPD 12—Policy for a Common Identification Standard for Federal Employees and Contractors*, 2 Pub. Papers 1765-1767 (Aug. 27, 2004) (HSPD-12) (reprinted at App. 1a-3a). In fact, HSPD-12 was intended only to ensure that the *identity* of employees and contractors at federal facilities can be reliably verified. *See id.*; Pet. 6; Pet. App. 82a n.9. Thus, the government's own declarant admitted in the district court that "HSPD-12 did not prompt" the background investigation policy, and that, "[a]bsent HSPD-12, NASA's NACI requirement for both employees and contractors would remain." C.A. App. 473.

3. The NACI has three steps. First, the subject individual must complete a Standard Form 85 (SF-85). Pet. App. 137a-144a. The SF-85 asks for, among other things, background information, such as employment and educational history, the names of three references, and details on recent drug use, including any drug-related treatment or counseling. It also requires the subject individual to sign a release authorizing the government to collect an expansive range of information from other sources. Based on the release, the govern-

ment can "obtain any information" from schools, landlords, employers, businesses, "or other sources of information." *Id.* at 144a. That information "may include, but is not limited to ... academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information." *Id.* Although SF-85 states that the information will be covered by the federal Privacy Act, it also explains that any such information may be "routine[ly]" disclosed "without your consent" to the news media or the general public, Congress, the courts, and "any source or potential source from which information is requested in the course of [the background] investigation." *Id.* at 138a. NASA submits the completed SF-85 to the Office of Personnel Management (OPM), which conducts the investigation. Pet. 8; C.A. App. 473.

Second, OPM sends each of the subject individual's references, employers, and landlords a Form 42 ("Investigative Request for Personal Information"). Pet. App. 145a-146a; Pet. 8.[3] This form asks the reference unbounded questions about the subject individual's character. Specifically, the form requests whether the reference has "any adverse information about this person's employment, residence, or activities concerning" violations of law, financial integrity, abuse of alcohol and/or drugs, mental or emotional stability, general behavior or conduct, "or other matters." The reference may "discuss the adverse information I have." Alternatively, the form provides space for the reference to write any information "which you feel may have a bearing on this person's suitability for government em-

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[3] This brief will use the term "reference" for the recipient of a Form 42.

ployment," including "derogatory as well as positive information."

Third, NASA will examine the information collected in OPM's investigation, and NASA will then determine whether the individual is "suitable" for access to NASA facilities, and therefore for continued employment at JPL. Pet. App. 4a-5a. The assessment of "suitability" is left to NASA's discretion. *See id.* at 82a (citing 5 C.F.R. § 731.103(a) ("[The U.S. Office of Personnel Management] delegates to the heads of agencies authority for making suitability determinations and taking suitability actions.")).

After concerned JPL employees asked what criteria NASA would use to determine their "suitability," JPL's management posted a "suitability matrix" on its website. Pet. App. 5a n.2; C.A. App. 1487; *see* App. 4a-10a. This matrix is titled "Issue Characterization Chart" and lists various factors, apparently reflecting criteria NASA will use in determining suitability. These factors include, among others, carnal knowledge, sodomy, indecent exposure, voyeurism, obscene telephone calls, indecent proposals, incest, bestiality, homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. *Id.*; Pet. App. 5a n.2.

Although the current record is undeveloped and unclear as to the "exact extent" and "manner" that NASA will inquire into these matters in order to assess suitability (Pet. App. 4a), NASA, in this litigation, has refused to deny that it will use the factors in the suitability matrix as part of the background investigations to determine suitability. *Id.* at 5a n.2 ("NASA neither concedes nor denies that these factors are considered as part of its suitability analysis"). Furthermore, at an

informational meeting on implementation of the NACI, the director of JPL stated that NASA would use the matrix as part of the NACI background investigations to determine suitability. C.A. App. 1471.

B. Procedural Background

1. Respondents sued NASA, arguing, as relevant here, that NASA's recently adopted requirement that employees like themselves—current Caltech employees in low-risk positions at JPL—submit to NACI background investigations violated their constitutional right to informational privacy. The district court denied respondents' motion for a preliminary injunction.

Viewing the privacy claim in two parts, one part challenging SF-85 and the other challenging NASA's suitability matrix (Pet. App. 62a), the district court first determined that the challenge to SF-85 was ripe because it was "undisputed" that if respondents did not complete SF-85, they would "be deemed to have voluntarily resigned." *Id.* at 63a. However, the court determined that the challenge to the suitability matrix, which had not yet been used to find any specific contractor "unsuitable," was unripe. *Id.*

The court then concluded that respondents were unlikely to succeed on their claim that SF-85, by itself, was unconstitutional. The court held that SF-85's questions were permissible because they were "relatively non-intrusive." Pet. App. 70a. The court also held that SF-85's signed release was narrowly tailored to two legitimate interests: " 'enhancing security' at federal facilities" and "[v]erifying the identity of federal contractors." *Id.* at 71a. The district court, however, did not address respondents' principal argument: that the background investigation as a whole—the SF-85, with

its release authorizing the government to collect "any information," *together* with Form 42's broad and open-ended questions and the "suitability matrix" that apparently informs all those inquiries—is unconstitutional. *Id.* at 10a, 26a.

2. The court of appeals reversed and granted a preliminary injunction.[4] The court concluded that a preliminary injunction was warranted because respondents had "raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor." Pet. App. 29a.[5]

The court first made clear that the district court had erred in construing respondents' challenge. The district court had erroneously "limit[ed] its analysis to the SF-85 questionnaire," and had thus "failed to consider the most problematic aspect of the government's investigation—the open-ended Form 42 inquiries,"

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[4] The court of appeals vacated its initial opinion (Pet. App. 30a-49a) after the government petitioned for rehearing, and issued a new opinion (*id.* at 1a-29a) cited herein.

[5] Under the standard applied by the Ninth Circuit, the grant of a preliminary injunction requires the applicant to show "either (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [the applicant's] favor." Pet. App. 7a-8a (citation omitted). The court found that the second prong was satisfied here. The government does not object to the standard applied by the court of appeals. Nor does this Court's recent decision in *Winter* v. *Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008), affect the standard, for the court of appeals made a specific finding that respondents would be irreparably harmed absent a preliminary injunction. *See* Pet. App. 29a.

which are posed against the backdrop of the suitability matrix. Pet. App. 17a, 25a.

The court of appeals then described the legal framework for assessing the informational privacy claim. The court recognized that the right to informational privacy, as developed in the lower courts following this Court's decisions in *Whalen* v. *Roe*, 429 U.S. 589 (1977), and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), "protects an individual interest in avoiding disclosure of personal matters" such as sexual activity, medical information, and financial matters. Pet. App. 17a-18a (citations and internal quotation marks omitted). Under those decisions, the government may "compel disclosure of [such] information" only if it can establish "that its use of the information would advance a legitimate state interest and that its actions [were] narrowly tailored to meet the legitimate interest." *Id.* at 18a (citation omitted).

Applying this framework, the court first concluded that most of SF-85 was "unproblematic" (Pet. App. 19a), including the question about the subject individual's recent illegal drug use, which the court found narrowly tailored to the government's "strong stance in its war on illegal drugs" (*id.* at 21a).

By contrast, there were "serious questions" about two aspects of the investigation: SF-85's inquiry on drug treatment or counseling, and Form 42's potentially overbroad scope. The court observed that SF-85's question requiring subject individuals to disclose drug treatment or counseling fell "squarely within the domain protected by the constitutional right to informational privacy." Pet. App. 22a. Yet "the government ha[d] not suggested any legitimate interest in requiring the disclosure of such information." *Id.* Thus,

the court concluded that, at this early stage of the litigation, there was a serious question whether this "narrow" aspect of SF-85 could survive respondents' constitutional challenge. *Id.*

With respect to Form 42, the court similarly concluded that the government had thus far, at the initial stage of litigation, failed to justify the broad scope of inquiry. Form 42's "broad, open-ended questions" and its solicitation of "any adverse information" appeared "designed to elicit a wide range" of information, potentially including information about private sexual matters, such as to "seemingly implicate the right to informational privacy." Pet. App. 22a. The information sought "range[d] far beyond" the scope of the government's posited "legitimate reasons for investigating its contractors" (including "verifying" their identities and "ensuring the security" of JPL's facilities (*id.* at 24a-25a)). Moreover, the court observed that the government had "steadfastly refused to provide any standards narrowly tailoring the investigations to the[se] legitimate interests" (*id.* at 26a), including refusing to disavow that the background investigation would involve inquiry into private sexual matters, as reflected in the suitability matrix (*id.* at 5a n.2, 25a).

Throughout its opinion, the court of appeals recognized that this case is still at a very early stage, that the record is still undeveloped, and that many important questions remain to be resolved. In particular, the court emphasized that the existing record was vague as to several key points necessary to deciding the merits of respondents' claim, including the extent to and manner in which the government would gather information, the role of the suitability matrix, the nature of any security risk thought to be posed by respondents, the standards governing the Form 42 inquiries, and

whether the information collected would be disclosed to anyone, including respondents' employer, Caltech. *See* Pet. App. 4a, 5a n.2, 22a, 24a, 25a, 91a.

The court also concluded that the balance of hardships "tips sharply toward [respondents], who face a stark choice—either violation of their constitutional rights or loss of their jobs." Pet. App. 26a. By contrast, NASA had not demonstrated any irreparable harm that would flow from retaining respondents in their current positions (without the additional background check) during the pendency of the litigation, given that "JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958." *Id.* at 27a.

The court of appeals denied the government's second petition for rehearing and rehearing en banc (Pet. App. 75a-130a) in a vote that was "not close" (*id.* at 76a).

REASONS FOR DENYING THE PETITION

The decision below does not warrant this Court's review. The court of appeals' decision is not a final judgment: it made no legal conclusions or factual findings that are binding in further proceedings on the merits, and it did not strike down NASA's background investigation process or otherwise finally resolve any issue. Instead, the court of appeals correctly decided, based on the limited record before it, that respondents had raised "serious questions" about their informational privacy claim. Nothing in the decision below precludes the government from fully making its case on remand to resolve those questions on the merits.

Nor does the government's petition offer any valid basis for this Court to grant certiorari. Contrary to the

government's suggestion, the decision below is not inconsistent with this Court's precedent, nor is it in conflict with decisions of other circuits. The government's argument that review is warranted because the court of appeals used a "flawed mode of analysis" (Pet. 29) in reaching its interlocutory decision is also without merit. The petition should therefore be denied.

I. THE COURT OF APPEALS' INTERLOCUTORY DECISION IS OF LIMITED SIGNIFICANCE

The procedural posture of this case makes it a poor vehicle for review. This Court disfavors review of interlocutory decisions and "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). Indeed, as the Solicitor General routinely argues, "[t]he lack of finality of the judgment below is 'of itself alone' a 'sufficient ground for the denial of the [writ].' " *See, e.g.*, Brief for the Federal Respondents in Opposition, *Equity in Athletics, Inc.* v. *Dep't of Educ.* 16 (U.S. Feb. 4, 2009) (No. 08-672) (quoting *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)). There is no reason to depart from that principle here.

Because a preliminary injunction is not a final decision, *Public Serv. Comm'n of Wisc.* v. *Wisconsin Tel. Co.*, 289 U.S. 67, 70 (1933), any legal or factual findings made in the course of granting such an injunction "are not binding at trial on the merits." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981); *see also id.* ("[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held"). Thus, this Court has made clear that it will not review the grant of a pre-

liminary injunction except under extraordinary circumstances, such as when the decision was "clearly erroneous." *Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam); *see also* Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (review is warranted only if there is a "clear-cut issue of law" that the court of appeals got "patently incorrect"). Moreover, those instances usually arise when the court of appeals' decision had the substance, if not the form, of finality—in other words, when the grant of a preliminary injunction effectively precluded, or at least diminished the need for, further proceedings. *See, e.g.*, *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 54 (2006) (court of appeals granted preliminary injunction because "the Solomon Amendment violated the unconstitutional conditions doctrine"); *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 857-858 (2005) (court of appeals granted preliminary injunction because counties' display of Ten Commandments violated the Establishment Clause); *Legal Servs. Corp.* v. *Velasquez*, 531 U.S. 533, 539 (2001) (court of appeals granted preliminary injunction because it "invalidated" a portion of the Legal Services Corporation Act).

The interlocutory decision below does not present any such extraordinary circumstances. It is not "clearly erroneous" (*see infra* Parts II and III) nor does the government even argue that it is. It also has none of the indicia of finality. The court of appeals did not hold that respondents are entitled to prevail on their informational privacy claim. The court of appeals did not even hold that respondents are "likely" to succeed on that claim. It determined only that NASA's newly instituted background investigation process for low-risk, current employees of Caltech at JPL raises "serious questions" (Pet. App. 3a, 8a), and that, in light of

the severe hardship that would be visited upon respondents through loss of their employment if they declined to submit to the NASA background investigation, a preliminary injunction should be put in place allowing them to remain in their positions without the need for that additional background check during the pendency of the litigation.

The government asserts, however (Pet. 29), that this "procedural context" should not prevent review because "the Ninth Circuit's decision rests on legal errors." The government mischaracterizes the nature of this lawsuit. Although the government's petition for certiorari now describes this lawsuit as a facial challenge to SF-85 and Form 42 (*see* Pet. 15), no one (until the Solicitor General's petition) has conceived of it that way before. To the contrary, all parties to this litigation have understood that respondents are challenging only NASA's application of its background investigation process *to them*—low-risk, long-time employees of Caltech who perform contract work for the government. As such, the complaint sought only an injunction against "further implementation of this background investigation program against JPL employees in non-sensitive positions." C.A. App. 1502. Likewise, the government's own trial counsel agreed that this case was not a facial challenge (*id.* at 58), and the court of appeals understood that this case applied only to "NASA's newly instated procedures requiring 'low risk' JPL personnel to yield to broad background investigations as a condition of retaining access to JPL's facilities" (Pet. App. 3a).

Moreover, there is no merit to the government's suggestion that the decision below "rests on legal errors." Based on the limited record before it, the court of appeals only found that it "appears, although it has

yet to be conclusively proven, that the government intends to pry into constitutionally protected private matters." Pet. App. 93a. Because the government, on the current record, has not offered justification for inquiring about medical or psychological counseling for drug use nor denied that it intends to collect (and possibly disclose) information about sexual practices and other highly private matters, the court of appeals concluded that the background investigation process raised "serious questions" regarding the informational privacy claim. However, the court of appeals repeatedly cautioned that the record was vague on important issues going to the merits of the informational privacy claim, and that the nature of those privacy rights could only be thoroughly considered on a fully developed record. *Id.* at 4a, 5a n.2, 92a. Indeed, the court—and the judges concurring in the denial of rehearing en banc—listed several key questions that need to be answered in order to decide the legal issue, including the extent to and manner in which the government will gather information based on the SF-85 release, the role of the suitability matrix, the nature of any security risk posed by respondents, the standards governing the Form 42 inquiries, and whether the information collected would be disclosed to anyone, including Caltech. *See id.* at 4a, 5a, 22a, 24a, 25a, 91a, 92a, 94a, 95a.

There is also no merit to the government's expressed concerns that the decision below has "potentially far-reaching consequences" (Pet. 23-24) and that it somehow "casts a constitutional cloud" on the background check process for civil service employees. As the court of appeals noted, it is difficult to argue that the preliminary injunction will have adverse consequences when "JPL has successfully functioned" for more than 50 years "without *any* background investi-

gations" of its low-risk employees. Pet. App. 27a (emphasis added). And the decision below has nothing to do with civil service employees; the preliminary injunction applies only to those current Caltech employees who work at JPL and are classified as low-risk.

In short, the decision below does not rest on legal errors in addressing a facial challenge, and it presents no "extraordinary circumstances" that would justify departing from this Court's practice of awaiting final judgment before granting review.

II. THE DECISION BELOW IS CORRECT

This Court has recognized that the Constitution protects a right to informational privacy: "the individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977); *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977). The court of appeals issued a preliminary injunction here because "serious questions" about respondents' right to informational privacy were raised by two aspects of the background check for low-risk employees at JPL: SF-85's requirement that respondents disclose information about drug treatment or counseling, and Form 42's potentially overbroad scope. That decision was correct, given that NASA has not yet provided any justification for requiring disclosure of drug treatment nor explained the extent to which it intends to delve into unquestionably private matters when assessing suitability (much less provided any justification for doing so).

1. The court of appeals correctly determined that there is a "serious question" whether SF-85's inquiry on drug treatment or counseling violates respondents' right to informational privacy. As the court of appeals

recognized (and as the government's petition does not challenge), that inquiry falls squarely within "the domain protected by the constitutional right to informational privacy" because it relates to highly personal "medical treatment and psychological counseling." Pet. App. 22a. Because the government did not even offer a legitimate interest for that inquiry, the court of appeals sensibly concluded that there was a serious question on the merits of this "narrow" issue. *Id.*; *see Whalen* v. *Roe*, 429 U.S. at 605 (evaluating informational privacy claim by balancing privacy interest with competing governmental interests); *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (same).

The government now suggests (Pet. 22) that it does have a legitimate interest for requiring respondents to disclose drug treatment or counseling: that information could allay the government's concerns about the subject individual's illegal drug use. *Id.* ("Just as recent drug usage raises legitimate concerns about government credentialing, so too does recent, successful drug therapy mitigate those concerns."). The government, however, did not raise this purported legitimate interest below,[6] and in any event it is unavailing. If the government wishes to know about recent drug treatment

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[6] The government first raised this point at oral argument in the court of appeals (*see* Oral Argument 34:20-40) and under Ninth Circuit precedent, that argument was waived. *Butler* v. *Curry*, 528 F.3d 624, 642 (9th Cir.), *cert. denied*, 129 S. Ct. 767 (2008); *see also FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below."). In any event, the government took a directly opposite position in its court of appeals brief, claiming that "treatment for an addiction to illegal drugs does not make the use of those drugs less illegal." Gov't C.A. Br. 30-31 n.5.

or counseling only to mitigate any concerns about illegal drug use, such that any response to the question presumably could only help the subject individual, then there would be no reason to *mandate* an answer, as SF-85 does. *See* Pet. App. 143a.

2. The court of appeals also correctly concluded that a "serious question" was raised whether NASA's use of Form 42 would violate respondents' right to informational privacy.

The court first determined that Form 42's "open-ended questions" would elicit information that "seemingly implicate[s] the right to informational privacy." Pet. App. 22a. There can be little doubt about that. The government claims (Pet. 23) that Form 42 only asks references for information about an applicant's suitability. However, NASA has a list of factors relevant to suitability that include carnal knowledge, sodomy, homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. *See* App. 4a-10a. The government has never denied that it will use these factors to determine suitability, and there is evidence in the record that NASA will in fact use Form 42—and the SF-85 release that allows the government to obtain "any information"—to collect (and possibly disclose to Caltech) such highly private information. C.A. App. 471, 1471; Pet. App. 26a, 91a. That information unquestionably "pertain[s] to an independently recognized private sphere" (Pet. 20) and implicates the right to informational privacy.[7]

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[7] Although the court of appeals found that respondents' direct challenge to the constitutionality of NASA's suitability determinations was unripe (Pet. App. 9a), it did not suggest that the suitabil-

The court then determined that the government had not justified its use of such a potentially overbroad inquiry. That determination was also proper. Although the court agreed that the government has legitimate interests for investigating respondents, including "verifying [their] identities" and "ensuring the security of the JPL facility" (Pet. App. 24a), the court noted that the government had not properly explained how its use of Form 42 was tailored to these legitimate interests.

The government has refused to disavow the suitability matrix (Pet. App. 5a n.2) or to explain why factors such as sexual orientation or illegitimate children could help the government verify respondents' identity or ensure the security of the JPL facility. Indeed, the court found that the government has "steadfastly refused to provide any standards narrowly tailoring the investigations" to these interests. *Id.* at 26a.

Because NASA's use of Form 42 inquiries (and the SF-85 release) could delve into unquestionably private matters, and because on the current record the government has provided no explanation for that intrusion, the court of appeals correctly concluded that respondents had raised "serious questions" warranting a preliminary injunction. Pet. App. 26a.

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ity matrix was irrelevant to the other aspects of respondents' challenge, and in particular their challenge to the unbounded waiver compelled by the SF-85 and the open-ended nature of the questions on Form 42. The existence of the matrix, a NASA administrator's statement that the matrix would be used to determine respondents' suitability for access to NASA facilities, and NASA's consistent refusal to disavow that the matrix will be used highlight the kinds of information that NASA seeks to delve into through the use of Form 42 and the background investigation process.

III. THE GOVERNMENT'S REASONS FOR GRANTING CERTIORARI LACK MERIT

Contrary to the government's contentions, the decision below does not conflict with any decision of this Court or any another court. Nor do the government's sundry other arguments for granting review have merit.

A. The Decision Below Does Not Conflict With This Court's Precedent

The government does not argue that there is no constitutional right to informational privacy. Nor does it argue that the decision below contravenes a holding by this Court. The government only suggests (Pet. 18) that the court of appeals did not follow two aspects of this Court's guidance in *Whalen* v. *Roe* and *Nixon* v. *Administrator of General Services*. That suggestion is incorrect; in any event, nothing in the decision below conflicts with this Court's precedents.[8]

The government first contends (Pet. 19) that *Whalen* and *Nixon* "distinguished" between collection of information and dissemination of information while the court of appeals "indicated that it would apply the same balancing test" regardless of the situation. But *Whalen* and *Nixon* did not draw any such bright line. Instead, both decisions suggested that the distinction between collection and dissemination is one of many case-specific factors to consider in the balancing analysis for an informational privacy claim. *See, e.g., Nixon,*

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[8] The government faults the court of appeals (Pet. 18) for failing to cite either *Whalen* or *Nixon*. That is a spurious charge. The court of appeals relied on several of its own precedents, which themselves relied on *Whalen*. *See* Pet. App. 17a-18a.

433 U.S. at 465 (listing eight relevant factors, including the likelihood of disclosure). That framework was followed here by the court of appeals, which noted that "the risk of public disclosure is undoubtedly an important consideration." Pet. App. 23a. But the possible protection against such disclosure was outweighed at this stage of the litigation by other factors, especially the government's failure to offer any justification for SF-85's drug treatment or counseling question or the use of Form 42 to delve into unquestionably private matters.

The government also contends (Pet. 19) that *Whalen* and *Nixon* determined that a privacy claim can be overcome by "statutory and regulatory protections limiting the public dissemination of the information," whereas the court of appeals "gave short shrift" to such protections. That is incorrect. The court of appeals acknowledged that "safeguards," such as the Privacy Act, "exist to help prevent disclosure of the applicants' highly sensitive information." Pet. App. 24a. But it found the existence of the Privacy Act not dispositive at this stage of the litigation, given that the Privacy Act broadly allows disclosure of personal information in many circumstances, including whenever the federal agency determines that disclosure of personal details would be in the public interest and would not constitute a clearly unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552a(b)(2); *id.* § 552(b)(6).

Moreover, *Whalen* and *Nixon* both had the benefit of a full record that provided proof of stringent safeguards. *See Whalen*, 429 U.S. at 594 (computer tapes containing confidential records were "kept in a locked cabinet," and the computer system was inaccessible to the public); *Nixon*, 433 U.S. at 462 (archivists handling confidential presidential materials had "an unblemished

record for discretion"). By contrast, the current record in this case is undeveloped as to the existence or effectiveness of any safeguards. Although the government has suggested that it "has taken measures to keep the information from being disclosed to the general public" (Pet. App. 23a), the government has never fully explained what its disclosure safeguards are, how they will work in practice, or how effective they might be. Moreover, respondents have alleged that NASA in fact plans to share the private information it collects with Caltech, potentially in violation of the Privacy Act. *See id.* at 92a-93a.

B. The Decision Below Does Not Create A Circuit Conflict

The government makes a half-hearted suggestion that the decision below creates a circuit split, asserting that the decision is in "substantial tension" with decisions from the D.C. and Fifth Circuits. Pet. 16. But there is no "tension," much less a circuit split.

The two decisions relied on by the government are readily distinguishable from this case. Those decisions involved federal government, civil service employees who held positions of public trust, meaning that they held moderate- or high-risk positions. *See American Fed. of Gov't Employees* v. *HUD*, 118 F.3d 786, 788 (D.C. Cir. 1997) (*AFGE*); *National Treasury Employees Union* v. *U.S. Dep't of Treasury*, 25 F.3d 237, 239 (5th Cir. 1994) (*NTEU*). These factual circumstances were crucial to the reasoning of both cases. Thus in *NTEU*, the Fifth Circuit recognized that public trust employees have "a diminished expectation of privacy." 25 F.3d at 244. The court took "pains to underscore the obvious: we are determining the rights of [the plaintiffs] in their capacity as public trust employees and

certainly not in their role as ordinary private citizens." *Id.* And in *AFGE*, the D.C. Circuit similarly explained that it was "reluctant to second-guess the [government's] conclusions regarding [the need to delve into private matters about] *employees in public trust positions*." 118 F.3d at 794 (emphasis added).

This case is not like *AFGE* or *NTEU*. Respondents are not civil service employees; they work for Caltech, not NASA. Respondents hold "low risk" positions; they are not in positions of public trust and do not have "a diminished expectation of privacy." To the extent the "Ninth Circuit's reasoning differs" (Pet. 28) from the reasoning of the D.C. and Fifth Circuits, it is because the critical facts are different.[9]

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[9] None of the government's arguments to the contrary is sound. The government first suggests (Pet. 28) that, unlike the D.C. and Fifth Circuits, the court of appeals ignored the legitimate interests it offered. This is a surprising accusation—surprising because it has no basis in the record. The court of appeals actually took note that the government had never offered a legitimate interest for its drug treatment or counseling question. Pet. App. 22a. And the court of appeals actually "agree[d] with the government that it has several legitimate reasons for investigating its contractors," including "verifying [their] identities" and "ensuring the security of the JPL facility." *Id.* at 24a. The government in this case, however, "steadfastly refused" to explain how its planned inquiries would serve these interests. *Id.* at 26a. The government next suggests (Pet. 28) that unlike the D.C. and Fifth Circuits, the court of appeals disregarded NASA's "considered judgment." This again is difficult to square with the Ninth Circuit's decision. The government explained its rationale for SF-85's question on recent drug use, and the Ninth Circuit credited it. Pet. App. 21a. The government did not explain its reason for SF-85's question on drug treatment or for Form 42, *see supra* pp. 17-21, and so the court had nothing to credit. Finally, the government argues (Pet. 28) that, unlike the D.C. and Fifth Circuits, the court

In sum, the decision below does not conflict with *AFGE* or *NTEU*. In fact, the only other federal court to confront the same question on similar facts as the court of appeals did here—*i.e.*, whether a preliminary injunction was warranted where the government sought to impose in-depth background investigations of low-risk, incumbent employees—came out the same way. *See National Treasury Employees Union* v. *U.S. Dep't of Treasury*, 838 F. Supp. 631, 637-638 (D.D.C. 1993) (noting that incumbent employees both have a heightened expectation of privacy and present a reduced risk of harm to the agency).

C. The Government's Remaining Arguments Lack Merit

Finally, the government raises four miscellaneous challenges to the court of appeals' analysis. None of these arguments supports granting the petition; in any event, they are meritless.

First, the government contends (Pet. 20) that the court of appeals should have distinguished between voluntary and compulsory disclosures of private information. That submission is completely without merit. Respondents would not be disclosing information "voluntarily" during the NACI process. They have all been working at JPL for years, and if they do not complete the investigation process, they will be terminated. Pet. App. 6a. This leaves respondents with "a stark choice—either violation of their constitutional rights or loss of their jobs." *Id.* at 26a. A background investigation that is imposed as a condition of keeping one's job

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of appeals did not distinguish between collection and dissemination. As explained *supra* pp. 21-22, that reasoning is unavailing.

is no more "voluntary" than is a demand that a government contractor support a particular political party, *see Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996), or a requirement that a government employee lose his job unless he takes a loyalty oath, *see Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

Second, the government contends (Pet. 20) that the court of appeals "apparently assumed" that the informational privacy right covers "any information that is not generally disclosed to the public." According to the government (*id.*), the right should cover only "information pertain[ing] to an independently recognized private sphere." The government is wrong. As an initial matter, neither *Whalen* nor *Nixon* limited the informational privacy right in that way. And in any case, the court of appeals' holding was not so broad. In defining the privacy right, the Ninth Circuit pointed specifically (Pet. App. 17a-18a) to its earlier decisions that addressed unquestionably private spheres such as sexual activity, *Thorne* v. *City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), medical information, *Norman-Bloodsaw* v. *Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998), and financial matters, *In re Crawford*, 194 F.3d 954 (9th Cir. 1999). It then held (Pet. App. 22a) that there were "serious questions" that both SF-85's question on drug treatment or counseling and NASA's use of Form 42 would result in the disclosure of such protected information, and that the government had not provided any counterbalancing justifications. As explained *supra* pp. 17-21, that holding is correct.

Third, the government contends (Pet. 20) that the court of appeals should have distinguished between information obtained from the individual and information obtained from third parties. To support this contention, the government analogizes to Fourth Amendment

doctrine, according to which "an individual does not have a reasonable expectation of privacy in information he voluntarily reveals to a third party, who subsequently conveys that information to the government." *Id.* at 21. The government's analogy is inapt, however, because the Fourth Amendment is different in kind from the right to informational privacy. The Fourth Amendment is concerned with *how* the government obtains information, while the right to informational privacy is concerned with *what* information the government obtains, regardless of how or from whom the information is obtained. The court of appeals recognized this important distinction, explaining that the right to informational privacy depends on "the *nature* of the information sought ... rather than on the manner in which the information is sought." Pet. App. 22a-23a n.5; *see also Nixon*, 433 U.S. at 465 (specifically holding that the right to informational privacy protects "personal communications" with third parties).

Fourth, the government contends (Pet. 21) that the court of appeals should have taken note that the government is acting as an employer in this case. This argument, however, assumes that respondents are employees of the federal government, which they are not. As the court of appeals correctly recognized, respondents "are employed by Caltech, not the government." Pet. App. 3a. In any event, this Court has never held that federal employees (or contractors) lose their constitutional rights while on the job. To the contrary, "a citizen who works for the government is nonetheless a citizen" and the Constitution "limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006).

In sum, the government has failed to present the Court with any reason why it should depart from its well-settled practice and grant review of an interlocutory decision in which the court of appeals did not make a definitive adjudication of the parties' legal rights. Accordingly, the Court should deny review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDICES

APPENDIX

HOMELAND SECURITY PRESIDENTIAL DIRECTIVE/ HSPD-12—POLICY FOR A COMMON IDENTIFICATION STANDARD FOR FEDERAL EMPLOYEES AND CONTRACTORS

August 27, 2004

Subject: Policy for a Common Identification Standard for Federal Employees and Contractors

(1) Wide variations in the quality and security of forms of identification used to gain access to secure Federal and other facilities where there is potential for terrorist attacks need to be eliminated. Therefore, it is the policy of the United States to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy by establishing a mandatory, Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors (including contractor employees).

(2) To implement the policy set forth in paragraph (1), the Secretary of Commerce shall promulgate in accordance with applicable law a Federal standard for secure and reliable forms of identification (the "Standard") not later than 6 months after the date of this directive in consultation with the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of the Office of Management and Budget (OMB), and the Director of the Office of Science and Technology Policy. The Secretary of Commerce shall periodically review the Standard and update the Standard as appropriate in consultation with the affected agencies.

(3) "Secure and reliable forms of identification" for purposes of this directive means identification that (a)

is issued based on sound criteria for verifying an individual employee's identity; (b) is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation; (c) can be rapidly authenticated electronically; and (d) is issued only by providers whose reliability has been established by an official accreditation process. The Standard will include graduated criteria, from least secure to most secure, to ensure flexibility in selecting the appropriate level of security for each application. The Standard shall not apply to identification associated with national security systems as defined by 44 U.S.C. 3542(b)(2).

(4) Not later than 4 months following promulgation of the Standard, the heads of executive departments and agencies shall have a program in place to ensure that identification issued by their departments and agencies to Federal employees and contractors meets the Standard. As promptly as possible, but in no case later than 8 months after the date of promulgation of the Standard, the heads of executive departments and agencies shall, to the maximum extent practicable, require the use of identification by Federal employees and contractors that meets the Standard in gaining physical access to Federally controlled facilities and logical access to Federally controlled information systems. Departments and agencies shall implement this directive in a manner consistent with ongoing Government-wide activities, policies and guidance issued by OMB, which shall ensure compliance.

(5) Not later than 6 months following promulgation of the Standard, the heads of executive departments and agencies shall identify to the Assistant to the President for Homeland Security and the Director of OMB those Federally controlled facilities, Federally controlled information systems, and other Federal ap-

plications that are important for security and for which use of the Standard in circumstances not covered by this directive should be considered. Not later than 7 months following the promulgation of the Standard, the Assistant to the President for Homeland Security and the Director of OMB shall make recommendations to the President concerning possible use of the Standard for such additional Federal applications.

(6) This directive shall be implemented in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a) and other statutes protecting the rights of Americans.

(7) Nothing in this directive alters, or impedes the ability to carry out, the authorities of the Federal departments and agencies to perform their responsibilities under law and consistent with applicable legal authorities and presidential guidance. This directive is intended only to improve the internal management of the executive branch of the Federal Government, and it is not intended to, and does not, create any right or benefit enforceable at law or in equity by any party against the United States, its departments, agencies, entities, officers, employees or agents, or any other person.

(8) The Assistant to the President for Homeland Security shall report to me not later than 7 months after the promulgation of the Standard on progress made to implement this directive, and shall thereafter report to me on such progress or any recommended changes from time to time as appropriate.

GEORGE W. BUSH

Issue Characterization Chart

1. Intoxicants

A	B	C	D
Drunk Drunk and disorderly Liquor law violation (use or possession by minor)	Drinking and driving Driving under influence Driving while intoxicated	Illegal manufacturing Illegal sale	Pattern of excessive use as reflected in: - convictions - job performance - employment gaps - inability to function responsibly - medical treatment or poor health

2. Drug Use

A	B	C	D
Infrequent use or possession of marijuana Possession of marijuana paraphernalia Arrested or charged with possession of marijuana	Regular use or possession of marijuana Infrequent use or possession of other controlled substances Possession of drug paraphernalia Cultivating marijuana for personal use	Transfer of controlled substance Possession for sale or resale Prescription fraud or forgery Sale of controlled substance Unlawful dispensing of prescription drugs Smuggling contraband drugs into prison Regular use of controlled substances other than marijuana	Pattern of use or excessive use as reflected in 1D above. manufacturing addiction importing trafficking cultivating for sale

3. Financial Responsibility

A	B	C	D
Bad check Infrequent, irregular, but deliberate delinquency in meeting financial obligations	Non-support Judgement, tax lien or other default with no attempt at resolution Illegal gambling Eviction	Pattern of irresponsibility as reflected in... - credit history - disregard for debts - abuse of fiduciary trust	Pattern of irresponsibility in 3C, plus... - continuing, major, valid liabilities

4. Criminal and Immoral Conduct

A	B	C	D
	Indecent exposure Solicitation Voyeurism, peeping tom Mailing, selling, or displaying obscene material Obscene phone call Indecent proposal	Carnal knowledge Sodomy Prostitution Bigamy or polygamy Pimping or pandering Keeping house of ill repute Contributing to delinquency of or corrupting morals of minor Sexual harassment Other sexual misconduct with impact on job	Pattern of misconduct as reflected in conviction records Child molestation Sexual assault Statutory rape Incest Bestiality

5. Honesty

A	B	C	D
Non-material, intentional false statement or deception or fraud in examination or appointment	Altering Breaking & entering Forgery Fraud Possession of stolen property Black market activities (non-profit)	Bribery Embezzlement Grand larceny Grand theft Mail theft Burglary Robbery (unarmed)	Pattern of dishonesty as reflected in... - disregard for truth - conviction records - abuse of trust, or - employment records Blackmail

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	Petty larceny Minor stealing or petty theft Shoplifting Abuse of property False statement Filing false instrument Failure to file income tax return	Perjury False impersonation (e.g., impersonating a law enforcement officer) Increase compensation of union goods Black market activities (with intent to profit) Income tax evasion Receiving stolen property	Counterfeiting Extortion Armed robbery Material, intentional false statement or deception or fraud in examination or appointment* Deliberate misrepresentation, falsification, or omission of material fact**

* 731.202 (b)(1) applies - Use solely for falsifications in the competitive examination/appointment process
** 731.202 (b)(2) applies - Use for falsifications outside the competitive examining process

6. Disruptive or Violent Behavior

A	B	C	D
Disorderly conduct Disturbing the peace Making a threat Resisting arrest Abusive language Unlawful assembly	Assault Damaging property Destroying property Hit & run Vandalism Criminal or malicious mischief Harassment Cruelty to animals Hindering prosecution Eluding police	Assault & battery Battery Manslaughter (involuntary)	Pattern of violence as reflected in... - conviction records - disregard for life or property - civil actions - employment records, or - medical records Aggravated assault Assault with deadly weapon Assault with intent to commit rape Kidnapping or abduction Murder Rape Arson Threat or assault upon public official Manslaughter (voluntary) Child abuse

7. Employment Misconduct, Negligence*

A	B	C	D
Attitude Personality Conflict	Insubordination Absenteeism or attendance problem Rules or regulation violation		Pattern of unemployability Based on misconduct or negligence as reflected in employment history

* Other issues (use or possession of intoxicants, controlled substances and marijuana, financial responsibility, criminal/immoral conduct, honesty, disruptive or violent behavior, etc.) which lead to termination or forced resignation are raised one level for adjudication purposes. For example, petty theft, a "B" issue by itself, becomes a "C" issue if it is determined to be the reason for termination or forced resignation from employment.

8. Firearms and Weapons

A	B	C	D
Possession of an unregistered firearm	Possession of a prohibited weapon Possession of illegal ammunition Carrying deadly weapon Unlawful Discharge of firearms	Carrying concealed weapon or firearm Brandishing firearm Possession of firearm by - felon Possession of loaded firearm Possession of explosives	Improper or illegal sale or transportation of firearms or explosives Illegal manufacture of firearms or explosives

9. Miscellaneous

A	B	C	D
Vagrancy Loitering Trespassing Minor traffic violation (traffic violations not required to be admitted on OF306 or other application material/QSP will not be considered issues)	Traffic violations greater than "A", but less than "C" Contempt of court Driving motor vehicle without owner's consent Possession of instrument of crime	Vehicular homicide Refusal to furnish testimony by 5 CFR 5.4 Tampering with a witness Harboring a fugitive	Hatch Act violation Mutilation or destruction of public records Engaging in riots or civil disorders Striking against the Government Desertion

NOTE:

For conduct not listed in this chart, attempt to find a like or related issue, and use the characterization of the listed issue. If unlisted conduct does not equate with a listed issue, but seems to relate more appropriately to a level where no issues are identified (such as level A for issue 4), identify the issue at the level. Criminal offenses shown as "attempted" or "accessory to" are characterized by the base charge (e.g., Attempted Burglary equals Burglary). Characterize the seriousness of the issue by the conduct it self rather than its outcome (e.g., "assault" may warrant actual characterization as a "D" issue rather than a "B" if the details show serious injury inflicted on the victim, etc). Any uncertainty about an issue should be resolved by an experienced Adjudicator.

The ranking of probation/parole violations is determined by the nature of the issue leading to the violation. For example, a probation/parole violation for driving while intoxicated is adjudicated at level "B" while a violation for assault with a deadly weapon is adjudicated at level "D."

10. Statutory Debarment

The following issues require *AUTOMATIC* debarment from Federal employment for the period specified below. The legal authority for debarment must be consulted prior to taking debarment action.

Issue	Debarment Period	Legal Authority
Illegally receiving, seeking, promising or offering compensation for services in matters affecting the Government	Indefinite	18 U.S.C. 203
Current, habitual use of intoxicating beverages to excess	NTE 3 years	5 U.S.C. 7352
Evidence of disloyalty; advocates or is a knowing member of an organization that advocates the overthrow of our constitutional form of government	Indefinite	5 U.S.C. 7311; 18 U.S.C. 1918
Participates in a strike against the Government	Indefinite	5 U.S.C. 7311; 18 U.S.C. 1918
Willful and unlawful concealment, removal, mutilation or destruction (or attempts) of public records and materials	Indefinite	18 U.S.C. 2071 (b)
Inciting, organizing, promoting, encouraging, engaging or aiding others to engage in riots or civil disorders	5 years from the date the conviction becomes final	5 U.S.C. 7313
Interference by an officer or member of the armed forces with elections	Indefinite	5 U.S.C. 593
Unlawful approval of bond or sureties by a postmaster	Indefinite (from employment as postmaster only)	18 U.S.C. 1733
Theft or unlawful concealment of money or other property of value from a bank or safe in, or adjacent to, a bank which is a Federal Reserve member or is insured by the Federal Deposit Insurance Corporation (FDIC)	Indefinite (from position of national bank examiner only)	18 U.S.C. 655

Unlawful trading in public property by collections or disbursing officer	Indefinite	18 U.S.C. 1901
Unauthorized disclosure of information by a farm credit examiner	Indefinite (from employment as a farm credit examiner only)	18 U.S.C. 1907
Unauthorized disclosure of information by a National Agricultural Credit Corporation (NACC) examiner	Indefinite (from employment as an NACC examiner only)	18 U.S.C. 1908
Committing treason against the United States	Indefinite	18 U.S.C. 2381
Inciting, assisting or participating in any rebellion or insurrection against the United States	Indefinite	18 U.S.C. 2383
Knowingly and willfully advocating, abetting, advising or teaching the overthrow of the United States Government or any political subdivision of the United States	5 years from the date of the conviction	18 U.S.C. 2385
Activities intended to impair the loyalty, morale and discipline of the United States Armed Forces	5 years from the date of the conviction	18 U.S.C. 2387
Conviction for misdemeanor crime (under Federal or State law) of domestic violence (use or attempted use of physical force, or the threatened use of a deadly weapon, committed by current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting or who has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim).	Indefinite from any positions requiring the individual to ship, transport, possess, or receive firearms or ammunition	PL 104-208 Omnibus Consolidated Appropriations Act of 1997 (amended the Gun Control Act of 1968)
Any individual who has been found guilty of, or has entered a plea of nolo contendere or guilty to any offense under Federal, State, or tribal law involving crimes of violence, sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.	Indefinite from any position involving regular contact with, or control over, Indian children	PL 101-630, Indian Child Protection and Family Violence Act, dated November 28, 1990, contains minimum standards. Refer also to Department of Interior or Health and Human Services agency regulations, as appropriate.
Knowing and willful failure to register under Section 3 of the Military Selective Service Act (50 U.S.C. App. 453)	Indefinite (only from positions in executive agencies)	5 U.S.C. 3328

- Applies to men born after December 31, 1959, who are or were required to register and who are not registered, or did not register before the requirement terminated or became inapplicable to the individual. Processing guidance can be found at 5 CFR 300.

11. Loyalty and Security

- Any *SUITABILITY* issue indicating evidence of disloyalty or terrorism that does *NOT* require statutory debarment will be adjudicated at level D.
- Homosexuality, in and of itself, while not a suitability issue, may be a security issue and must be addressed completely, when indications are present of possible susceptibility to coercion or blackmail.
- Cohabitation, adultery, illegitimate children, etc. are rarely suitability issues but, in certain circumstances, may be security issues.
- Previous instances of security violations, clearance denials or revocations are included.
- Any other issue not listed elsewhere may be a suitability issue considered in security adjudication. (Examples are judgment, reliability, and dependability issues)

12. Qualifications (including health)

- Lack of required knowledge, skills, and abilities
- Inability to perform or poor performance which is not due to negligence or misconduct
- Physical health issues; and
- Mental, emotional, psychological, or psychiatric issues which do not include other issues listed in this Appendix.

13. Issues Relating to Associates

- Issues listed in this chart that relate to an associate of the person under investigation.

14. Issues Relating to Relatives

- Issues listed in this chart that relate to a relative of the person under investigation.
- Use issue codes 13 or 14 only when the issue has a bearing on the suitability or security determination of the person under investigation.

Bribery of public officials and witnesses, and graft in connection with public service matters may also serve as a basis for debarment. Some misconduct requires removal form Federal employment, but no automatic debarment. (*See 5 CFR 735*)

- SUITABILITY UPGRADE – considers that multiple issues raise more serious questions about suitability

FREQUENCY	UPGRADE ACTION
2 ISSUES IN 0-36 MONTHS	RAISE BOTH ISSUES ONCE (e.g., "A" to "B")
3 OR MORE ISSUES IN 0-36 MONTHS	RAISE ALL ISSUES TWICE (e.g., "A" to "C")

- DOWNGRADE (CONVERSION) OF ISSUES - considers issues over 36 months old to be less serious

ISSUE		PERIOD IN WHICH ISSUE OCCURRED		
		0-36 MO	*37-72 MO*	*73-108 MO*
B	CONVERTS TO	B	A	NON-ISSUE
C		C	B	A
D		D	C	B

Note: Any issues over 108 months are considered to be non-issues.

- DEBARMENT ACTION (only OPM may impose the maximum 3 year period of debarment. Agencies may impose up to one year and may use the chart to determine if referral to OPM for a longer bar is warranted)

ISSUE	RECENCY		
	0-12 MO	*13-24 MO*	*25-36 MO*
C	24 MO DEBAR	18 MO DEBAR	12 MO DEBAR*
D	36 MO DEBAR	24 MO DEBAR	18 MO DEBAR*

* OPM would rarely take action on a case in which less than a 24 month bar remains. Debarment action will only be taken on C issue cases when careful assessment of the job-relatedness of the specific issue(s) involved warrants such action. The disqualifying nature of the conduct in D issue cases usually warrants debarment action.

The debarment period begins on the date of the final decision letter or 120 days after the control date, whichever is closer to the control date. IN REMOVAL DECISION,

CONSIDER IMPOSING MAXIMUM DEBARMENT RATHER THAN RELYING ON THE DEBARMENT PERIODS STATED IN THE CHART.

- DETERMINING RECENCY OF ISSUE(S) – The following control dates by type of case are used in determining the recency of issue(s) for issue conversion or upgrade purposes:

TYPE OF CASE	CONTROL DATE
Civil Service Register or Outside Register Applicant Filing Directly with Agency	Date document (i.e., OF 306, etc.) containing conduct information was first considered by Personnel Office. (If referred to OPM-FIPC-SAS, use the date of referral or objection/passover)
Investigated Applicant	Date subject signed investigative data form.
Appointee or Employee	Date subject signed investigative data form. (However, if falsification/fraud of a material fact is discovered, use date conduct first identified as an issue. In addition, when determining debarment length at the final decision stage, consider imposing the maximum debarment rather than relying on the debarment periods calculated with the control date.)

When new actionable issues arise subsequent to the original control date, the control date becomes the date of occurrence of the most recent actionable conduct.

The control date for cases involving an applicant whose previous application was canceled because of pending charges is the date of referral of the current or most recent application. If two or more applications are received for suitability determination, the control date for the case is the earliest referral date.

REPLY BRIEF

Supreme Court, U.S.
FILED
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No. 09-530

In the Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

AFGE v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997) 3, 4

Butz v. *Economou*, 438 U.S. 478 (1978) 6

NTEU v. *United States Dep't of the Treasury*, 25 F.3d 237 (5th Cir. 1994) 3, 4

Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) 2, 3

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. *United States Dep't of Agr.*, 499 F.3d 1108 (9th Cir. 2007) 6

United States v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001) 8

United States v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) 6

Whalen v. *Roe*, 429 U.S. 589 (1977) 2

Regulations:

Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 comp.) 5

Exec. Order No. 13,467, 3 C.F.R. 196 (2009) 10

§ 2.3(b) 10

Miscellaneous:

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 8

70 Fed. Reg. 61,230 (2005) 9

75 Fed. Reg. 5359 (2010) 9

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REPLY BRIEF FOR THE UNITED STATES

The court of appeals held that conducting basic background checks of contract employees seeking access to NASA's Jet Propulsion Laboratory (JPL)—using forms that for many years have been routine in the federal sector—intrudes upon and likely violates a federal constitutional right to informational privacy. The court so held even though the government collects only employment-related information, acquires this information only from the individuals themselves and persons they designate, and protects the information from public disclosure. The Ninth Circuit's decision extends well beyond any decision of this Court, stands in stark contrast to decisions from two other courts of appeals, and has potentially far-reaching consequences. This Court's review is warranted.

1. a. The decision below is unprecedented and wrong. The court of appeals recognized a constitutional privacy

right that is implicated any time the government collects information that a person would "not generally disclose[] * * * to the public." Pet. App. 22a (internal quotation marks omitted). The court drew no distinction between the government's mere collection of information for legitimate governmental purposes and its disclosure of such information to the public, and it ignored the Privacy Act, which protects against public disclosure of the information collected. Pet. 19-20. Further, the court failed to give weight to the reduced expectations of privacy in the employment context or to distinguish between the government's interests as a regulator and its interests as a proprietor or employer. Pet. App. 110a-111a (Callahan, J., dissenting from denial of rehearing en banc). And the court ignored the widespread and longstanding use of the forms at issue. *Id.* at 126a-127a (Kozinski, C.J., dissenting from denial of rehearing en banc). The court of appeals' holding thus restricts the government's ability to gather information, including of the most routine kind, in circumstances never before thought to raise any issues.

b. The decision below extends far beyond this Court's decisions. In *Whalen* v. *Roe*, 429 U.S. 589 (1977), the informational privacy concerns the Court identified stemmed not from the collection and use of the information, which the Court recognized served important public purposes, but from the prospect of public disclosure of sensitive information. *Id.* at 598-605. The Court further concluded that statutory and regulatory protections against public dissemination of the information collected satisfied any constitutional privacy concerns. *Id.* at 605-606; see also *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 455-457 (1977). By contrast, here the court decided that the government's mere solicitation and receipt of information through widely used forms that ask questions typical in such inquiries could

violate a constitutional privacy right, even if the information was never publicly disclosed. Respondents' *post hoc* attempt (Br. in Opp. 21-23) to harmonize the decision below with *Whalen* and *Nixon* is unavailing, but ultimately beside the point, for the court of appeals did not even cite *Whalen* and *Nixon*, much less analyze this case under the framework those decisions applied.[1] Nor did the court cite the Privacy Act, which addresses the privacy concerns that those decisions raised. See Pet. 19-20 (outlining Privacy Act protections). Contrary to respondents' contention (Br. in Opp. 22), the court nowhere suggested that the Privacy Act's protections against disclosure are inadequate, let alone explained such a conclusion.

c. Nor can the decision below be reconciled with decisions of the Fifth and D.C. Circuits upholding materially indistinguishable employment-related inquiries against privacy-based challenges. See Pet. 25-29 (discussing *NTEU* v. *United States Dep't of the Treasury*, 25 F.3d 237 (5th Cir. 1994), and *AFGE* v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997)); see also Pet. App. 98a (Callahan, J., dissenting from denial of rehearing en banc). Respondents observe (Br. in Opp. 23-24) that the other circuits considered challenges brought by federal employees, not contractors. But that factual difference does not explain the circuits' wide divergence in legal approach.

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[1] Contrary to respondents' suggestion (Br. in Opp. 21-22), whether the information collected would be disclosed publicly was not merely "one of many" factors in the Court's analysis; it was the Court's central focus. See *Nixon*, 433 U.S. at 458-459 (*Whalen* "[e]mphasiz[ed] the precautions utilized by New York State to prevent the unwarranted disclosure of private medical information"; "the Act challenged here mandate[s] regulations similarly aimed at preventing undue dissemination of private materials").

The Fifth and D.C. Circuits emphasized that "the individual interest in protecting the privacy of the information sought by the government is significantly less important where the information is collected by the government but not disseminated publicly." *AFGE*, 118 F.3d at 793-794; see *NTEU*, 25 F.3d at 244 ("[T]he [background check] questionnaire requires these public trust employees only to disclose information to the IRS, as their employer—not to anyone else, and certainly not to the public."). The Ninth Circuit made no such distinction. See Pet. App. 17a-18a. Had this case been brought in the Fifth or D.C. Circuits, the result would have been different.

2. The effects of the decision below are potentially dramatic and far-reaching. The Ninth Circuit overrode the considered judgment of the federal agencies that basic background checks of federal contract employees are necessary to ensure the security of federal facilities and information systems to which those employees would have access. Pet. App. 22a-23a, 25a-26a. That judgment was reached after a 2004 Presidential directive required the agencies to improve credentialing of persons working at federal facilities so as to address the serious security concerns that arose as a result of the September 11, 2001, attacks. Pet. 6-8, 24. Both the Department of Commerce and NASA determined that security concerns justified use of the National Agency Check with Inquiries (NACI) process or a substantially equivalent alternative for contract employees. Pet. 6-8 & n.2. The result of the Ninth Circuit's decision is to "sharply curtail[] the degree to which the government can protect the safety and security of federal facilities"—in particular, the multi-billion-dollar JPL, which houses "some of the most sensitive and expensive equipment owned by NASA." Pet. App. 96a, 120a (Callahan, J., dissenting from denial of rehearing en banc). Contract em-

ployees occupy all positions at JPL, with access to NASA facilities and information systems similar to their civil service counterparts. C.A. App. 469-470.[2]

The decision below casts a constitutional shadow far beyond JPL. The government conducts background checks for millions of civil service employees and contract employees annually, using the same NACI process and forms at issue here. Such a process has been used for federal employees for over 50 years. See Pet. 3 (citing Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 comp.)). As a result of the decision below, the federal government faces significant uncertainty about what background checks might be constitutional in the Ninth Circuit, and this uncertainty may have still broader consequences because the federal government promulgates standard forms and procedures on a nationwide basis.

The majority's broad ruling provides no guidance to the United States or to the numerous state and local governments in the Ninth Circuit. On denial of rehearing en banc, the author of the majority opinion suggested that "reasonable" background checks may be justified when the government has a "sufficiently great" justification and "adheres to proper limiting standards." Pet. App. 85a (Wardlaw, J., concurring in denial of rehearing en banc). But the judge did not provide any explanation of what would count as "reasonable," "sufficient[]," or "proper." Other judges expressed concern that the panel's holding could "undermine personnel background investigations performed daily by

---

[2] Although one of the respondents characterizes JPL as an open "university campus type environment," Br. in Opp. 3 (quoting C.A. App. 145), that assertion lacks foundation in the record. There are security checkpoints at all entrances to JPL, and everyone who gains access to JPL, including Caltech faculty, "must apply for and receive a badge from NASA." C.A. App. 766, 771.

federal, state, and local governments." *Id.* at 97a (Callahan, J., dissenting from denial of rehearing en banc). Indeed, Judge Kleinfeld suggested that federal judges hiring law clerks may not be able to "talk to professors and past employers and ask some general questions about what they are like." *Id.* at 124a (Kleinfeld, J., dissenting from denial of rehearing en banc).

The disruptive effects of the decision below on critical government operations warrant this Court's review. See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 480-481 (1978) (granting certiorari in part to ensure "the effective functioning of government"); *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 400 (1966) (granting certiorari "because of the importance of these questions in the administration of government contracts").

3. Respondents contend (Br. in Opp. 2, 12) that review is premature because the decision arises in the context of a preliminary injunction. They are mistaken.

The Ninth Circuit set out a legal framework for assessing informational privacy claims that will bind the district court on remand and the court of appeals in future cases. See, *e.g.*, *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am.* v. *United States Dep't of Agr.*, 499 F.3d 1108, 1114 (9th Cir. 2007) ("the general rule" that "decisions at the preliminary injunction phase do not constitute the law of the case" does not apply to "conclusions on pure issues of law"; such conclusions are "binding" as law of the case and in future cases). In particular, the court determined that the government's collection of employment-related information for contract employees implicates a constitutional right to informational privacy, Pet. App. 22a, and that the framework for assessing whether that right has been violated requires ad hoc balancing of the intrusion on privacy interests against the government's need for the

information sought, *id.* at 17a-18a. The court also decided that it makes no difference in the constitutional analysis whether the information is collected by the government for its own use or is widely disclosed to the public; whether the government is acting as a proprietor or employer or instead as a regulator when collecting the information; or whether any statutory or regulatory provisions protect the information from public disclosure. Pet. 19-22.

Respondents do not seriously contend that the district court may vary from the court of appeals' legal framework for assessing informational privacy claims. Instead, they claim (Br. in Opp. 14, 16) that the Ninth Circuit did not hold that they would likely succeed on the merits of their claims. That is wrong. See, *e.g.*, Pet. App. 22a ("Appellants are likely to succeed on this * * * portion of their informational privacy challenge to SF 85."); *id.* at 36a-37a (respondents "are likely to succeed on the merits"); *id.* at 44a-45a ("the district court erred in finding that [respondents] were unlikely to succeed on their" Form 42 claim).

Respondents also argue (Br. in Opp. 11-12) that further development of the record is necessary to explore why the government is seeking the information, how the government gathers the information, and what the government does with the information once collected. The only issue before the court of appeals was the collection of information through Standard Form 85 (SF-85) and Form 42, which by their terms are limited to employment-related purposes. No further information is required to review the court of appeals' legal conclusions about those two forms. The court held as to SF-85, which asks an individual who has acknowledged using illegal drugs within the past year whether he received any treatment or counseling, Pet. App. 143a, that the balancing inquiry it thought appropriate should be resolved in respondents' favor because "the gov-

ernment has failed to demonstrate a legitimate state interest" supporting the collection of the information, *id.* at 22a. The court reached that conclusion even though acknowledging that "any treatment or counseling received for illegal drug use * * * *lessen[s]* the government's concerns regarding the underlying activity," *ibid.*, which is precisely why the government has an interest in the information. Further, the court determined as to Form 42, a two-page form sent to designated references asking for information bearing on the applicant's "suitability for government employment or a security clearance," *id.* at 146a, that although the government had legitimate interests in seeking such information, *id.* at 24a, the government had failed to show that the Form's "open-ended" questions were "narrowly tailored to meet" those needs, *id.* at 24a-25a. In light of these rulings, respondents' assertion (Br. in Opp. 12) that "[n]othing in the decision below precludes the government from fully making its case on remand" rings hollow.

Review by this Court of interlocutory decisions is appropriate when an "important" issue of law "is fundamental to the further conduct of the case," "particularly if the lower court's decision is patently incorrect and the interlocutory decision, such as a preliminary injunction, will have immediate consequences for the petitioner." Eugene Gressman et al., *Supreme Court Practice* 281 (9th ed. 2007) (citing cases). For example, the Court granted certiorari in *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 489 (2001), to review an interlocutory decision requiring a district court to consider a "medical necessity" defense to a Controlled Substances Act violation, because the court of appeals' decision "raise[d] significant questions as to the ability of the United States to enforce the Nation's drug laws." Review likewise is warranted here: the Ninth Circuit's expansive and erroneous legal ruling leaves little

room for the government on remand and casts into doubt an important means for the government to ensure that it hires trustworthy employees and appropriately protects federal facilities.

4. Contrary to respondents' repeated contention, the background checks at issue seek only employment-related information, and the case presents no issue regarding whether the government relies on improper factors in making employment-related decisions.

a. As explained in the petition, SF-85 and Form 42 collect only employment-related information, and all information collected is subject to the extensive protections in the Privacy Act. Pet. 3-6, 22-23. An examination of SF-85 and Form 42 makes that point clear: both forms limit their scope to questions, routine in the employment context, regarding whether the applicant is "suitable for the job" (Pet. App. 137a; see *id.* at 145a-146a), and both expressly state that the Privacy Act protects any information collected (*id.* at 138a, 145a). There is no basis for respondents' suggestion (Br. in Opp. 16) that Form 42 is used to obtain information about private sexual activity: Nothing on the face of Form 42 requests such information, Pet. App. 145a-146a; the form is not "used for any purpose other than a personnel background investigation," 75 Fed. Reg. 5359 (2010); it asks only for information that "may have a bearing on this person's suitability for government employment or a security clearance," Pet. App. 146a; it is sent only to persons the applicant designates, *id.* at 145a-146a; and it takes only five minutes to complete, see 70 Fed. Reg. 61,230 (2005).

b. Respondents contend (Br. in Opp. 7, 16, 19-20) that the government's credentialing decisions "could delve into unquestionably private matters," appending to their brief a chart (matrix) they say evidences this possibility. That claim is not before this Court. Respondents brought two

privacy-based claims: that the inquiries on SF-85 and Form 42 are "overly broad and intrusive," and that, once that information is collected, JPL will make credentialing decisions on improper grounds. Pet. App. 62a. Both the district court and the court of appeals decided that the second challenge was "unripe and unfit for judicial review," because the government had not even begun the background checks of respondents and respondents' claims are "strictly speculative." *Id.* at 8a-9a, 61a-63a; see Br. in Opp. 8 (acknowledging those holdings). And contrary to respondents' repeated assertions and intimations (Br. in Opp. 9, 10, 11, 16, 20), the court of appeals' constitutional analysis of respondents' informational privacy claim concerning SF-85 and Form 42 was not linked to the use of the chart they have appended. The court's opinion mentions the chart only once, in a footnote in the opinion's background portion (see Pet. App. 5a n.2), and it is not referred to at all in the court's analysis of respondents' informational privacy claim (see *id.* at 17a-26a).

In any event, at no point in this litigation has the government claimed authority to make credentialing determinations on criteria unrelated to employment. See Pet. 9 n.5. NASA has informed this Office that it does not use the chart appended to respondents' brief to decide whether to provide identity credentials to federal contract employees and that NASA management has so instructed officials within the agency on several occasions. Further, in response to Executive Order No. 13,467, 3 C.F.R. 196 (2009), in which the President charged the Office of Personnel Management (OPM) with "developing and implementing uniform and consistent policies and procedures" for determining "eligibility for logical and physical access" to federal facilities, *id.* § 2.3(b) at 200, OPM has issued standards that all agencies must use in credentialing federal contract em-

ployees. Those standards do not consider private sexual activity or any other improper factors.

Although approximately 39,000 NASA contract employees had completed the requisite background investigations as of September 21, 2007, C.A. App. 473-474, respondents cite neither any irregularities in the credentialing process nor any denials of credentials based on the use of improper criteria. If an employee believes that an adverse decision was made on any such improper ground, he is afforded a right of review. See *id.* at 951. The opinion at issue here does not concern that kind of claim. The decision below instead calls into constitutional question the government's ability to use standard employment forms in deciding whether to provide security credentials to contract employees working at a sensitive federal facility. That unprecedented ruling warrants review.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

FEBRUARY 2010

JOINT APPENDIX

Supreme Court, U.S.
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No. 09-530

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: NOV. 2, 2009
CERTIORARI GRANTED: MAR. 8, 2010

TABLE OF CONTENTS

Page

Court of appeals docket entries 1

District court docket entries 20

Complaint (Aug. 30, 2007) 58

Standard Form 85: Questionnaire for Non-Sensitive Positions 88

Form 42: Investigative Request for Personal Information 96

Issue Characterization Chart 98

Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of All Departments and Agencies (Aug. 5, 2005) 105

Attachment A: HSPD-12 Implementation Guidance for Federal Departments and Agencies 107

Attachment B: Homeland Security Presidential Directive 12 / HSPD-12 (Aug. 27, 2004) 127

FIPS PUB 201-1, Personal Identity Verification (PIV) of Federal Employees and Contractors (Mar. 2006) 131

NPR 1600.1: NASA Security Program Procedural Requirements w/Change 1 (Nov. 8, 2005) 151

Amendment of Solicitation/Modification of Contract (Aug. 7, 2006) 157

Amendment of Solicitation/Modification of Contract (Jan. 29, 2007) 159

Amendment of Solicitation/Modification of Contract (Apr. 19, 2007) 160

Contract Appendix 1: NASA and Caltech Understanding Concerning the NASA Jet Propulsion Laboratory 163

NASA Interim Directive (NPR 1600.1) (May 24, 2007) 170
Memo from Eugene L. Tattini to JPL Employees and Contractor Personnel (June 11, 2007) 184
Declaration of Josette Bellan (Aug. 7, 2007) 187
Declaration of Robert M. Nelson (Aug. 29, 2007) 194
Declaration of Susan Paradise (Aug. 29, 2007) 200
Declaration of Randy J. Aden (Sept. 21, 2007) 205
Declaration of Cita M. Furlani (Sept. 21, 2007) 215
Declaration of Clinton G. Herbert (Sept. 21, 2007) 220
Declaration of Riley Duren (Sept. 26, 2007) 227
Declaration of Susan D.J. Foster (Sept. 26, 2007) 234

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-56424

ROBERT M. NELSON, WILLIAM BRUCE BRANERDT, JULIA BELL, JOSETTE BELLAN, DENNIS V. BYRNES, GEORGE CARLISLE, KENT ROBERT CROSSIN, LARRY R. D'ADDARIO, RILEY M. DUREN, PETER R. EISENHARDT, SUSAN D.J. FOSTER, MATTHEW P. GOLOMBEK, VAROUJAN GORJIAN, ZAREH GORJIAN, ROBERT J. HAW, JAMES KULLECK, SHARON L. LAUBACH, CHRISTIAN A. LINDENSMITH, AMANDA MAINZER, SCOTT MAXWELL, TIMOTHY P. MCELRATH, SUSAN PARADISE, KONSTANTIN PENANEN, CELESTE M. SATTER, PETER M.B. SHAMES, AMY SNYDER HALE, WILLIAM JOHN WALKER AND PAUL R. WEISSMAN, PLAINTIFFS

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; AND CALIFORNIA INSTITUTE OF TECHNOLOGY

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/4/07	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (YIN): n. [07-56424] (KKW)
	* * * * *	
10/04/07	3	Filed Virginia Keeny for Appellant William Bruce Branerdt, Appellant Robert M. Nelson Civil Appeals Docketing Statement served on 10/4/07 (to CONFATT) [07-56424] [07-56424] (KKW)
10/4/07	4	Filed Appellant Robert M. Nelson, Appellant William Bruce Branerdt emergency motion to stay further action; served on 10/4/07 MOATT. (KKW)
10/4/07	6	Filed "electronically" Appellees NASA, et al. response to emergency motion for an injunction pending appeal [4]; exhibits; served on 10/4/07 (MOATT) [07-56424]

DATE	DOCKET NUMBER	PROCEEDINGS
10/4/07	7	Filed "electronically" Appellee CIT's response in opposition to emergency motion for stay and expedited appeal [4]; exhibits; served on 10/4/07 (MOATT) [07-56424]
10/05/07	5	Filed order (Betty B. FLETCHER, Stephen R. REINHARDT, Marsha S. BERZON,): This is a preliminary injunction appeal. Accordingly, Ninth Circuit Rule 3-3 shall apply. Appellant's emergency motion for a temporary injunction is granted to the extent set forth below. Appellees are enjoined, through 10/12/07, or until further order of the court, whichever is earlier, from requiring appellants to submit the questionnaires for nonsensitive positions, including the authorization forms for release of information. In the meantime, the court will consider whether to extend the temporary injunction until the appeal of

DATE	DOCKET NUMBER	PROCEEDINGS
		the denial of the preliminary injunction is resolved. The complaint in this case and the motion for a preliminary injunction were filed on 8/30/07. Plaintiffs advised the district court from the outset that relief was needed by 10/5/07. The district court decided the motion on 10/3/07. The motion for an emergency injunction pending appeal was filed in this court on the next day, on the afternoon of 10/4/07. The motion, responses and exhibits consist of 984 pages. Appellants allege that they can be terminated from employment if they do not comply with appellees' requirement that they submit the completed authorization forms and the questionnaires for non-sensitive positions by the close of business today, 10/5/07. The court has not had the opportunity to consider fully the voluminous material filed in connection with

DATE	DOCKET NUMBER	PROCEEDINGS
		the emergency motion. As far as we can determine in the short time available, appellants likely raise serious legal and constitutional questions, and show the probability of irreparable harm. What is quite clear is that the balance of hardships tips strongly in their favor. Most of the appellants have worked for Jet Propulsion Laboratories for many years, and the government has been considering and planning the implementation of the new requirements for well over a year. We, therefore, grant a temporary injunction through 10/12/07. (CITE) The court will consider whether to issue an injunction pending appeal on or before that date. Appellants' motion to expedite this appeal is granted. If they have not already done so, within 5 calendar days of the filing date of this order, the parties shall make arrangements to

DATE	DOCKET NUMBER	PROCEEDINGS
		obtain from the court reporter an official transcript of proceedings in the district court that shall be included in the record on appeal. The briefing schedule is set as follows: the opening brief is due not later than 10/25/07; the answering brief is due 11/8/07 or 14 days after service of the opening brief, whichever is earlier; and the optional reply brief is due within 7 days of service of the answering brief. (CITE) (Faxed to all parties by MOATT) [07-56424] (DWL)
10/5/07	8	Filed Appellee CIT response opposing emergency motion for stay and expedited appeal under CR 27-3, w/separate exhibits in support, served on 10/4/07 MOATT [07-56424] (CW)
		* * * * *
10/11/07	12	Filed Order For Publication (Betty B. FLETCHER, Stephen R. REINHARDT,

DATE	DOCKET NUMBER	PROCEEDINGS
		Marsha S. BERZON,): Aplts' motion for an injunction pending appeal is GRANTED . . . (see order for full text) Accordingly, the injunction granted by this court on 10/5/07 will continue in effect pending an expeditious appeal. Aplts' motion for a stay of distirct court proceedings is DENIED. [4] The briefing schedule prevsly established remains in effect. The clerk shall calendar this appeal during the week of Dec. 3-7, 2007, in S.F. or Pasadena, CA. [07- 56424]
10/11/07	13	Filed attorney for Appellant Civil Appeals Docketing Statement served on 10/4/07 (to CONFATT) [07-56424] [07-56424] (CW)
		* * * * *
10/22/07	15	CALENDARED: PASA Wed Dec 5, 2007 9:30 am Courtroom 1 [07-56424] (XX)

DATE	DOCKET NUMBER	PROCEEDINGS
10/29/07	18	Filed original and 15 copies aplts opening brief (Informal: no) 59 pages; 5 excerpts of record (7 Exc. vol); served on 10/25/07 (minor defcy: no stmt of rel cases) Notified counsel. FEDEX BRIEF/EOR TO PANEL [07-56424] (CW)
10/31/07	20	Received Amicus Union of Concerned's brief in 25 copies of 7 pages; deficient: no consent of aplts stated; served on 10/30/07 Notified counsel. [07-56424] (LA)
11/1/07	22	Filed Amicus Electronic Frontier's motion to file amici brief in support of pltfs appeal. [07- 56424] served on 10/31/07 FEDEX TO PANEL (CW)
11/1/07	25	Received Amicus Electronic Frontier's brief in 15 copies of 14 pages; deficient: motion to file amici brief pending ; served on 10/31/07. FEDEX TO PANEL [07-56424] (LA)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/9/07	28	Filed original and 15 copies appellee CIT's 34 pages brief; served on 11/8/07 (PANEL) [07-56424] (LA)
11/09/07	29	Filed original and 15 copies appellees NASA, Michael Griffin, DOC, Carlos M. Gutierrez's 60 pages brief; served on 11/8/07 (PANEL) [07-56424] (LA)
	* * * * *	
11/13/07	35	Filed original and 25 copies Union of Concerned's brief of 7 pages; served on 10/30/07 [07-56424] (LA)
11/19/07	33	Filed original and 15 copies Robert M. Nelson, William Bruce Branerdt reply brief, (Informal: no) 32 pages; served on 11/15/07 [07-56424] (CW)
	* * * * *	
12/5/07	40	ARGUED AND SUBMITTED TO David R. THOMPSON, Kim M. WARDLAW, Edward C. Reed [07-56424] (LN)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
12/10/07	42	Filed original and 15 copies Electronic Frontier's brief of 14 pages; served on 10/31/07 [07- 56424] (CW)
1/9/08	46	*Original Hard Copy rcv'd 1/11/08* Received Mark C. Holscher for Appellee CIT letter dated 1/9/08 re: dc's order dismissing complaint against caltech. (SERVED PANEL) [07- 56424] (PG)
1/11/08	48	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. David R. THOMPSON; Kim M. WARDLAW, author; Edward C. Reed.) FILED AND ENTERED JUDGMENT. [07-56424] (CW)
		* * * * *
2/25/08	56	Filed original and 50 copies Appellee NASA, Appellee Michael Griffin, Appellee DOC, Appellee Carlos M. Gutierrez petition for panel

DATE	DOCKET NUMBER	PROCEEDINGS
		rehearing and petition for rehearing en banc 19 p. pages, served on 2/25/08 (PANEL/ACTIVE JUDGES/ INTERESTED SENIOR JUDGES) [07-56424] (LA)
		* * * * *
3/5/08	59	Filed order (DAVID R. THOMPSON, KIM MCLANE WARDLAW and EDWARD C. REED) Granting. setting response of William Bruce Branerdt and Robert M. Nelson to response to Deft-Aples' petition for panel or rehearing en banc. Response due 03/26/2008. (phoned & faxed parties) (AF)
3/31/08	60	Filed original and 50 copies of Appellants William Bruce Branerdt and Robert M. Nelson response to Petition for en banc rehearing. 15 pages. Served on 03/26/2008. Date circutlated to the court: 04/02/2008 (04/02/2008) (RR)

DATE	DOCKET NUMBER	PROCEEDINGS
4/10/08	61	ENTRY UPDATED. Filed order (DAVID R. THOMPSON, KIM MCLANE WARDLAW and EDWARD C. REED) Denying Petition for en banc rehearing filed by appellees Michael Griffin, DOC, NASA and Carlos M. Gutierrez—[Edited 04/10/2008 by HH]: ORDER ISSUED IN ERROR. (BJB)
4/25/08	62	MANDATE ISSUED. (DRT, KMW and ECR) (TB)
4/28/08	63	Filed clerk order (Deputy Clerk:SW): Recalling mandate as being issued in error (SW)
6/20/08	64	FILED ORDER AND OPINION (DAVID R. THOMPSON, KIM MCLANE WARDLAW and EDWARD C. REED) Our prior opinion filed on January 11, 2008, and reported at 512 F.3d 1134 is vacated concurrent with the filing of a new opinion today. The petition for panel rehearing and the petition for rehearing

DATE	DOCKET NUMBER	PROCEEDINGS
		en banc are denied as moot. The parties may file new petitions for rehearing and rehearing en banc in accordance with the Federal Rules of Appellate Procedure. IT IS SO ORDERED. REVERSED AND REMANDED [Reversed/Vacated; Terminated on the merits after oral hearing; Written, reasoned, signed, published; Judge: DRT On Panel But Did Not Write, Judge: KMW Authoring, Judge: ECR On Panel But Did Not Write]. FILED AND ENTERED JUDGMENT.—[Edited 06/20/2008 by JI] (JI)
		* * * * *
8/4/08	66	Filed original and 50 copies of Appellees CIT, Michael Griffin, Carlos M. Gutierrez, NASA and DOC petition for panel rehearing and petition for rehearing en banc. Number of Pages 20. Served on 08/04/2008. Date circu-

DATE	DOCKET NUMBER	PROCEEDINGS
		lated to the court: 08/05/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) (TB)
8/18/08	67	Filed order (DAVID R. THOMPSON, KIM MCLANE WARDLAW and EDWARD C. REED): Plaintiffs-Appellants are hereby directed to file a response to Defendants-Appellees' Petition for Panel Rehearing or Rehearing En Banc. The response shall not exceed 15 pages. An original and 50 copies shall be filed within 21 days. (AF)
9/9/08	68	Filed original and 50 copies of Appellants' opposition to petition for panel rehearing or rehearing en banc. Number of pages 15. Served on 09/09/2008. Date circulated to the court: 09/10/2008 (PANEL-ACTIVE JUDGES-ANY INTERESTED SENIOR JUDGES) PLEASE NOTE: THE ATTACHED DOCUMENT

DATE	DOCKET NUMBER	PROCEEDINGS
		IS A DOCUMENT INTERNAL TO THE COURT AND IS NOT ACCESSIBLE ON PACER OR ECF. (RR)
6/4/09	69	Filed Order for PUBLICATION (DAVID R. THOMPSON, KIM MCLANE WARDLAW and EDWARD C. REED, JR.) (Concurrence by Judge Wardlaw. Dissents by Judges Callahan, Kleinfeld and Chief Kozinski) Judges Thompson, Wardlaw, and Reed voted to deny Appellees' petition for panel rehearing. Judge Wardlaw voted to deny Appellees' petition for rehearing en banc, and Judges Thompson and Reed so recommended. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsider-

DATE	DOCKET NUMBER	PROCEEDINGS
		ation. Fed. R. App. P. 35. Judges O'Scannlain and Ikuta were recused. The petition for rehearing en banc is denied. IT IS SO ORDERED. (RP)
6/8/09	70	Filed (ECF) Appellees Michael Griffin, Carlos M. Gutierrez, NASA and DOC Motion to stay the mandate. Date of service: 06/08/2009. [6949062] (MNP)
6/10/09	71	Filed order (DAVID R. THOMPSON, KIM MCLANE WARDLAW and EDWARD C. REED, JR.): Appellees' motion to stay issuance of the mandate pending filing and disposition of petition for writ of certiorari is GRANTED. The mandate shall be stayed to and including September 8, 2009. If a petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court. IT IS SO ORDERED. (AF)

DATE	DOCKET NUMBER	PROCEEDINGS
8/24/09	72	Filed (ECF) Appellees Michael Griffin, Carlos M. Gutierrez, NASA and DOC Motion for miscellaneous relief [MOTION TO EXTEND STAY OF MANDATE PENDING FILING AND DISPOSITION OF PETITION FOR CERTIORARI]. Date of service: 08/24/2009. [7038488] (MNP)
9/1/09	73	Received letter from the Supreme Court dated 08/25/2009 regarding Extension of time to file petition for rehearing for a writ of certiorarri to 10/2/09. [7047779] (SW)
9/1/09	74	Filed order (DAVID R. THOMPSON, KIM MCLANE WARDLAW and EDWARD C. REED, JR.) Appellees' motion to extend the stay of issuance of the mandate pending filing and disposition of a petition for writ of certiorari is GRANTED. The mandate shall be stayed to and including Octo-

DATE	DOCKET NUMBER	PROCEEDINGS
		ber 8, 2009. If a petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court. IT IS SO ORDERED. [7048455] (BJB)
9/23/09	75	Filed (ECF) Appellees Michael Griffin, Carlos M. Gutierrez, NASA and DOC Motion for miscellaneous relief [MOTION TO FURTHER EXTEND STAY OF MANDATE PENDING FILING AND DISPOSITION OF PETITION FOR CERTIORARI]. Date of service: 09/23/2009. [7072335] (MNP)
9/25/09	76	Received letter from the Supreme Court dated 09/23/2009 regarding Extension to file a writ of certiorari has been extended to 11/1/09. [7076525] (SW)
9/30/09	77	Filed order (DAVID R. THOMPSON, KIM MCLANE WARDLAW and EDWARD C. REED, JR.) Appellees' motion to further extend the stay of issuance of

DATE	DOCKET NUMBER	PROCEEDINGS
		the mandate pending filing and disposition of a petition for writ of certiorari is GRANTED. The mandate shall be stayed to and including November 9, 2009. If a petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court. IT IS SO ORDERED. [7079128] (BJB)
11/5/09	78	Received notice from the Supreme Court: petition for certiorari filed on 11/02/2009. Supreme Court Number 09-530. [7122733] (SW)
3/11/10	79	Received notice from the Supreme Court. Petition for certiorari GRANTED on 03/08/2010. Supreme Court Number 09-530. [7264526] (SW)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF LOS ANGELES

No. 2:07-cv-05669-ODW-VBK

ROBERT M. NELSON, ET AL., PLAINTIFFS

v.

NATIONAL AERONAUTICS AND SPACE AGENCY, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
8/30/07	1	COMPLAINT against Defendants National Aeronautical and Space Agency, Michael Griffin, Department of Commerce, Carlos M Gutierrez, California Institute of Technology. (Filing fee $ 350 PAID.), filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian,

DATE	DOCKET NUMBER	PROCEEDINGS
		Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. (et) (Entered: 09/04/2007)
8/30/07		20 DAY Summons Issued re Complaint - (Discovery) 1 as to National Aeronautical and Space Agency, Michael Griffin, Department of Commerce, Carlos M Gutierrez, California Institute of Technology, DOES 1-100. (et) (Entered: 09/04/2007)
8/30/07	2	NOTICE of Interested Parties filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren,

DATE	DOCKET NUMBER	PROCEEDINGS
		Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. (et) (Entered: 09/04/2007)
		* * * * *
8/30/07	4	NOTICE OF MOTION AND MOTION for Preliminary Injunction filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J

DATE	DOCKET NUMBER	PROCEEDINGS
		Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames.Motion set for hearing on 9/24/2007 at 01:30 PM before Judge Otis D Wright II. Lodged proposed order. (sm) (Entered: 09/07/2007)
8/30/07	5	REQUEST FOR JUDICIAL NOTICE re MOTION for Preliminary Injunction 4 filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L

DATE	DOCKET NUMBER	PROCEEDINGS
		Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. (sm) (Entered: 09/07/2007)
8/30/07	6	DECLARATIONS AND EXHIBITS in support of MOTION for Preliminary Injunction 4 filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P

DATE	DOCKET NUMBER	PROCEEDINGS
		McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. (sm) (Entered: 09/07/2007)
8/30/07	7	DECLARATIONS AND EXHIBITS in support of MOTION for Preliminary Injunction 4 filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B

DATE	DOCKET NUMBER	PROCEEDINGS
		Shames. (sm) (Entered: 09/07/2007)
		* * * * *
9/4/07	3	STANDING ORDER which controls case and differs in some respects from local rules by Judge Otis D Wright II(lc) (Entered: 09/05/2007)
		* * * * *
9/21/07	23	Federal Defendants' MEMORANDUM in Opposition to Plaintiffs'MOTION for Preliminary Injunction 4, filed by Defendants National Aeronautical and Space Agency, Michael Griffin, Department of Commerce, Carlos M Gutierrez. (bho) (Entered: 09/27/2007)
9/21/07	24	California Institute of Technology's MEMORANDUM in Opposition to Plaintiffs' MOTION for Preliminary Injunction 4, filed by Defendant California Institute of

DATE	DOCKET NUMBER	PROCEEDINGS
		Technology. (bho) (Entered: 09/27/2007)
9/21/07	25	DECLARATION of RANDY J. ADEN in Support of California Institute of Technology's Opposition to Plaintiffs' MOTION for Preliminary Injunction 4, filed by Defendant California Institute of Technology. (bho) (Entered: 09/27/2007)
9/21/07	26	DECLARATION of COZETTE HART in Support of California Institute of Technology's Opposition to Plaintiffs' MOTION for Preliminary Injunction 4 filed by Defendant California Institute of Technology. (bho) (Entered: 09/27/2007)
9/21/07	27	DECLARATION of ALEXANDER PILMER in Support of California Institute of Technology's Opposition to MOTION for Preliminary Injunction 4, filed by Defendant California Institute of Technology. (bho) (Entered: 09/27/2007)

DATE	DOCKET NUMBER	PROCEEDINGS
9/21/07	28	DECLARATION of STEPHEN PROIA in Support of California Institute of Technology's Opposition to Plaintiffs' MOTION for Preliminary Injunction 4, filed by Defendant California Institute of Technology. (bho) (Entered: 09/27/2007)
		* * * * *
9/27/07	39	JOINT REPLY in support MOTION for Preliminary Injunction 4 filed by Plaintiffs. (lc) (Entered: 10/04/2007)
9/27/07	44	REPLY to Opposition to MOTION for Preliminary Injunction 4 filed by Plaintiffs. (ad) (Entered: 10/09/2007)
9/27/07	45	SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE in support of MOTION for Preliminary Injunction 4 filed by plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul

DATE	DOCKET NUMBER	PROCEEDINGS
		R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. (ad) (Entered: 10/09/2007)
9/27/07	46	ADDITIONAL DECLARATIONS AND EXHIBITS in support of MOTION for Preliminary Injunction 4 filed by Plaintiffs. (ad) (Entered: 10/09/2007)
		* * * * *
9/28/07	33	Amicus Curiae Brief filed by Amicus Union for Concerned

DATE	DOCKET NUMBER	PROCEEDINGS
		Scientists. (lc) (Entered: 10/01/2007)
		* * * * *
9/28/07	38	Amicus Curiae Brief in support of plaintiff's motion for preliminary injunction filed filed by Amicus Electronic Frontier Foundation. (lc) (Entered: 10/04/2007)
		* * * * *
10/1/07	41	MINUTES OF Motion Hearing held before Judge Otis D Wright II:, RE: plaintiffs MOTION for Preliminary Injunction 4; matter stands submitted; an order will issue; Court sets hearing regarding permanent injunction for Friday, 10/19/2007 at 03:30 PM. Court Reporter: Anne Kielwasser. (lc) Modified on 10/4/2007 (lc,). (Entered: 10/04/2007)
10/3/07	40	ORDER denying plaintiffs MOTION for Preliminary Injunction 4 by Judge Otis D

DATE	DOCKET NUMBER	PROCEEDINGS
		Wright II (lc) (Entered: 10/04/2007).
		* * * * *
10/4/07	43	NOTICE OF APPEAL to 9th CCA filed by plaintiff Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. Appeal of Order 40 Filed On: 10/3/2007; Entered On: 10/4/2007; Filing fee $455, paid, receipt number 100457. cc: Virginia Kee-

DATE	DOCKET NUMBER	PROCEEDINGS
		ny (dmap) Additional attachment(s) added on 4/10/2008 (dmap,). (Entered: 10/05/2007)
10/4/07		Civil Appeals Docketing Statement received from forwarded to 9th CCA. RE: Appeal to 9th Circuit Court of Appeals 43. (dmap) (Entered: 10/05/2007)
10/5/07		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re: Appeal to 9th Circuit Court of Appeals 43. (dmap) (Entered: 10/05/2007)
10/16/07	53	TRANSCRIPT filed for proceedings held on 10/1/07 Court Reporter: Anne Kielwasser. (mo) (Entered: 10/30/2007)
		* * * * *
10/22/07	50	STIPULATION AND ORDER that plaintiffs have to 10/22/07 to file and serve amended complaint; defendants have to 11/21/07 to an-

DATE	DOCKET NUMBER	PROCEEDINGS
		swer or otherwise respond to amended complaint; plaintiffs have to 12/5/07 to serve and file opposition to any motion regarding amended complaint; defendants have to reply to any opposition; resolution of defendants motions regarding amended complaint shall be heard 1/7/08 1:30 PM; all briefs and supporting papers shall be served vial e-mail or overnight mail by Judge Otis D Wright II(lc) (Entered: 10/23/2007)
10/22/07	51	FIRST AMENDED COMPLAINT against defendants National Aeronautical and Space Agency, Michael Griffin, Carlos M Gutierrez, California Institute of Technology, DOES amending Complaint - (Discovery), 1, filed by plaintiff Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert

DATE	DOCKET NUMBER	PROCEEDINGS
		M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames (lc) (Entered: 10/24/2007)
		* * * * *
11/6/07	54	RECORD ON APPEAL sent to Circuit Court re: Appeal number 07-56424. Record consists of 3 volumes; 1 transcripts; 2 bulky documents, documents number: B0006 and B0007 re Appeal to 9th Circuit Court of Appeals 43. (dmap) (Entered: 11/06/2007)
11/21/07	55	CALTECH'S MOTION to Dismiss First Amended Complaint for Injunctive and

DATE	DOCKET NUMBER	PROCEEDINGS
		Declaratory Relief Pursuant to Rule 12(b)(6) filed by Defendant California Institute of Technology. Motion set for hearing on 1/7/2008 at 01:30 PM before Judge Otis D Wright II. Lodged Order. (vh) (Entered: 11/27/2007)
11/21/07	56	NOTICE OF MOTION re MOTION to Dismiss First Amended Complaint for Injunctive and Declaratory Relief Pursuant to Rule 12(b)(6) MOTION to Dismiss First Amended Complaint for Injunctive and Declaratory Relief Pursuant to Rule 12(b)(6) 55 filed by Defendant California Institute of Technology. (vh) (Entered: 11/27/2007)
11/21/07	57	REQUEST FOR JUDICIAL NOTICE in Support of Caltech's MOTION to Dismiss First Amended Complaint for Injunctive and Declaratory Relief 55 filed by Defendant California Institute of

DATE	DOCKET NUMBER	PROCEEDINGS
		Technology. (vh) (Entered: 11/27/2007)
11/21/07	58	FEDERAL DEFENDANTS' NOTICE OF MOTION AND MOTION to Dismiss; Memorandum of Points and Authorities in Support Thereof filed by Federal Defendants National Aeronautical and Space Agency, Michael Griffin, Department of Commerce, Carlos M Gutierrez, Secretary of Commerce. Motion set for hearing on 1/7/2008 at 01:30 PM before Judge Otis D Wright II. (vh) (Entered: 11/27/2007)
12/5/07	59	PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE in Support of Opposition to Defendants' Motions to Dismiss, re 55, 58 filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nel-

DATE	DOCKET NUMBER	PROCEEDINGS
		son, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. (vh) (Entered: 12/11/2007)
12/5/07	60	OPPOSITION to Caltech's Motion to Dismiss, re 55 filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian,

DATE	DOCKET NUMBER	PROCEEDINGS
		Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. (vh) (Entered: 12/11/2007)
12/5/07	61	PLAINTIFFS' OPPOSITION to Federal Defendants' Motion to Dismiss, re 58 filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer,

DATE	DOCKET NUMBER	PROCEEDINGS
		Scott Maxwell, Timothy P McElrath, Susan Paradise Konstantin Penanen, Celeste M Satter, Peter M B Shames. (vh) (Entered: 12/11/2007)
12/14/07	63	PLAINTIFFS' NOTICE OF MOTION AND MOTION for Class Certification; Memorandum of Points and Authorities and Declaration in Support Thereof filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise,

DATE	DOCKET NUMBER	PROCEEDINGS
		Konstantin Penanen, Celeste M Satter, Peter M B Shames. Motion set for hearing on 1/7/2008 at 01:30 PM before Judge Otis D Wright II. (vh) (Entered: 12/19/2007)
12/14/07	64	DECLARATION of Virginia Keeny in Support of Motion for Class Certification, re 63 filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B

DATE	DOCKET NUMBER	PROCEEDINGS
		Shames. (vh) (Entered: 12/19/2007)
		* * * * *
1/11/08	74	NOTICE RE NINTH CIRCUIT COURT OF APPEAL DECISION filed by all plaintiffs (lc) (Entered: 01/18/2008)
1/15/08	70	MINUTES OF IN CHAMBERS ORDER held before Judge Otis D Wright II: Order VACATING the Courts previous ruling on Defendant California Institute of Technologys Rule 12(b)(6) Motion to Dismiss. The Court now VACATES its previous order. A new order will be issued forthwith. (sce) (Entered: 01/15/2008)
		* * * * *
1/16/08	71	MINUTES OF IN CHAMBERS ORDER held before Judge Otis D Wright II: Court grants in part and denies in part Federal Defendants MOTION to Dismiss

DATE	DOCKET NUMBER	PROCEEDINGS
		58. (see document for specifics) (lc) (Entered: 01/18/2008)
1/16/08	72	MINUTES OF IN CHAMBERS ORDER held before Judge Otis D Wright II: Defendant Caltech's MOTION to Dismiss First Amended 55 is granted; and all claims against Caltech is dismissed with prejudice. (lc) (Entered: 01/18/2008)
1/24/08	76	TRANSCRIPT filed for proceedings held on 10/1/07 Court Reporter: Anne Kielwasser. (ml) (Entered: 01/30/2008)
		* * * * *
2/6/08	80	TRANSCRIPT filed for proceedings held on 1/11/08 Court Reporter: Deborah K. Gackle. (bem,) (Entered: 02/08/2008)
2/7/08	79	ANSWER to Amended Complaint,, 51 filed by Federal Defendants National Aeronautical and Space Agency, Michael Griffin, Department

DATE	DOCKET NUMBER	PROCEEDINGS
		of Commerce, Carlos M Gutierrez. (Mei, Vesper) (Entered: 02/07/2008)
		* * * * *
2/13/08	81	MEMORANDUM in Opposition to MOTION to Certify Class 63 filed by Defendants National Aeronautical and Space Agency, Michael Griffin, Department of Commerce, Carlos M Gutierrez. (Attachments: # 1 Proposed Order # 2 Exhibit Exhibit to Opposition to Motion for Class Certification) (Mei, Vesper) (Entered: 02/13/2008)
2/13/08	82	NOTICE OF MOTION AND MOTION to amend *and for Clarification* filed by Federal Defendants National Aeronautical and Space Agency, Michael Griffin, Department of Commerce, Carlos M Gutierrez.Motion set for hearing on 3/10/2008 at 01:30 PM before Judge Otis D Wright II. (Attachments: # 1 Proposed Order # 2 Ex-

DATE	DOCKET NUMBER	PROCEEDINGS
		hibit Declaration and Exhibits in Support of Motion for Clarification) (Mei, Vesper) (Entered: 02/13/2008)
		* * * * *
2/14/08	84	NOTICE of Filing of Exhibit to Opposition to Plaintiffs' Motion for Class Certification filed by federal defendants National Aeronautical and Space Agency, Michael Griffin, Department of Commerce, Carlos M Gutierrez. (Attachments: # 1 Exhibit in Support of Memorandum in Opposition to Plaintiffs' Motion for Class Certification)(Mei, Vesper) (Entered: 02/14/2008)
2/15/08	85	NOTICE OF APPEAL to the 9th CCA filed by Plaintiff Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D

DATE	DOCKET NUMBER	PROCEEDINGS
		J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. Appeal of Minutes of In Chambers Order 72 Filed on: 01/16/08, Entered On: 01/18/08. Filing Fees: Billed. (Stormer, Dan) Modified on 2/15/2008 (cbr,). (Entered: 02/15/2008)
2/15/08	86	Civil Appeals Docketing Statement received from Plaintiff Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P

DATE	DOCKET NUMBER	PROCEEDINGS
		Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames forwarded to 9th CCA. RE: Notice of Appeal to 9th Circuit Court of Appeals,, 85 (Stormer, Dan) (Entered: 02/15/2008)
		* * * * *
2/15/08	89	MINUTES OF Status Conference held before Judge Otis D Wright II: The Court confers with counsel re: case status and discovery. The Court sets a Further Status Conference for Thursday, 4/17/2008 02:00 PM.Court Reporter: Anne Kielwasser. (lc) (Entered: 02/15/2008)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
2/25/08	92	OPPOSITION to MOTION to amend *and for Clarification* filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R Weissman, Josette Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. (Keeny, Christy) (Entered: 02/25/2008)
2/27/08	93	REPLY IN SUPPORT OF MOTION to Certify Class 63 filed by Plaintiffs Amy Snyder Hale, William John Walker, Julia Bell, Paul R

DATE	DOCKET NUMBER	PROCEEDINGS
		Weissman, Josett[illegible] Bellan, Dennis V Byrnes, George Carlisle, Kent Robert Crossin, Robert M Nelson, Larry R D'Addario, Riley M Duren, Peter R Eisenhardt, Susan D J Foster, Matthew P Golombek, Varoujan Gorjian, Zareh Gorjian, Robert J Haw, James Kulleck, Sharon L Laubach, William Bruce Banerdt, Christian A Lindensmith, Amanda Mainzer, Scott Maxwell, Timothy P McElrath, Susan Paradise, Konstantin Penanen, Celeste M Satter, Peter M B Shames. Keeny, Christy) (Entered: 2/27/2008)
3/3/08	94	REPLY in support MOTION to amend *and for Clarification* filed by Defendants National Aeronautical and Space Agency, Michael Griffin, Department of Commerce, Carlos M Gutierrez. (Attachments: # 1 Exhibit to Reply in Support of Motion to Clarify)(Mei, Vesper) (Entered: 03/03/2008)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/13/08	99	MINUTES OF Motion Hearing held before Judge Otis D Wright II:, RE: Federal defendants MOTION to Clarify: The Court informs the parties that it intends to WITHDRAW its oral order of January 11, 2008. Plaintiffs request a two week STAY of the Courts withdrawal of its January 11, 2008 order in order to seek review and guidance from the Ninth Circuit. The Court GRANTS plaintiffs request. (see document for specifics); The Court ORDERS Government defendants to cease any further investigations of employees per the Ninth Circuits ruling that the investigations are over broad and not justified by statute. The parties inform the Court that the pending Motion for Class Certification has been fully briefed. The Court defers ruling on the motion pending

DATE	DOCKET NUMBER	PROCEEDINGS
		the outcome of the Ninth Circuit appellate proceedings. Court Reporter: Anne Kielwasser. (lc) (Entered: 03/17/2008)
		* * * * *
9/12/08	109	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 85 filed by Dennis V Byrnes, Susan Paradise, Larry R D'Addario, Scott Maxwell, Amanda Mainzer, Robert J Haw, George Carlisle, Paul R Weissman, Konstantin Penanen, Christian A Lindensmith, Riley M Duren, Matthew P Golombek, Susan D J Foster, Peter M B Shames, Zareh Gorjian, Varoujan Gorjian, Kent Robert Crossin, Sharon L Laubach, Timothy P McElrath, Peter R Eisenhardt, James Kulleck, Robert M Nelson, Josette Bellan, Julia Bell, William Bruce Banerdt, Amy Snyder Hale, William John Walker, Celeste M Satter,

DATE	DOCKET NUMBER	PROCEEDINGS
		CCA # 08-55308. Although the judisdiction of the District Court to have issued the January 16, 2008 Order dismissing Caltech remains in question,we lack appellate jurisdiction to entertain this interlocutory appeal under 28 U.S.C 1292(a)1). We therefore dismiss appeal number 08-55308 without prejudice to appellants appealing on the same arguments when a final judgment is entered, See Sierra Club v. Elec. Controls Design, Inc., 909 F. 2d 1350, 1353 (9th Cir. 1990), or should Caltech take action that would work irreparable harm on appellants. We reserve the right to hear this appeal at the appropriate time. (dmap) (Entered: 09/16/2008)
10/8/08	110	MANDATE of 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 85, CCA # 08-55308. The Notice of Appeal is DISMISSED. Mandate received in this dis-

DATE	DOCKET NUMBER	PROCEEDINGS
		trict on 10/08/08. (lr) (Entered: 10/10/2008)
		* * * * *
6/4/09	118	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 43 filed by Dennis V Byrnes, Susan Paradise, Larry R D'Addario, Scott Maxwell, Amanda Mainzer, Robert J Haw, George Carlisle, Paul R Weissman, Konstantin Penanen, Christian A Lindensmith, Riley M Duren, Matthew P Golombek, Susan D J Foster, Peter M B Shames, Zareh Gorjian, Varoujan Gorjian, Kent Robert Crossin, Sharon L Laubach, Timothy P McElrath, Peter R Eisenhardt, James Kulleck, Robert M Nelson, Josette Bellan, Julia Bell, William Bruce Banerdt, Amy Snyder Hale, William John Walker, Celeste M Satter, CCA # 07-56424. Judge Thompson, Wardlaw, and Reed voted to deny Appel-

DATE	DOCKET NUMBER	PROCEEDINGS
		lees' petition for panel rehearing. Judge Wardlaw voted to deny Appellees' petition for rehearing en banc, and Judge Thompson and Reed so recommended. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. Judge O'Scannlain and Ikuta were recused. The petition for rehearing en banc is denied. IT IS SO ORDERED. Order received in this district on 6/04/09. (lr) (Entered: 06/08/2009)
6/10/09	119	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 85 filed by Dennis V Byrnes, Susan Paradise, Larry R D'Addario, Scott Maxwell, Amanda Mainzer, Robert J

DATE	DOCKET NUMBER	PROCEEDINGS
		Haw, George Carlisle, Paul R Weissman, Konstantin Penanen, Christian A Lindensmith, Riley M Duren, Matthew P Golombek, Susan D J Foster, Peter M B Shames, Zareh Gorjian, Varoujan Gorjian, Kent Robert Crossin, Sharon L Laubach, Timothy P McElrath, Peter R Eisenhardt, James Kulleck, Robert M Nelson, Josette Bellan, Julia Bell, William Bruce Banerdt, Amy Snyder Hale, William John Walker, Celeste M Satter, CCA # 07-56424. Appellees' motion to stay isuance of the mandate pending filing and disposition of petition for writ of certiorari is GRANTED. The mandate shall be stayed to and including September 8, 2009. If a petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court. (cbr) (Entered: 06/12/2009)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
9/1/09	122	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 43 filed by Dennis V Byrnes, Susan Paradise, Larry R D'Addario, Scott Maxwell, Amanda Mainzer, Robert J Haw, George Carlisle, Paul R Weissman, Konstantin Penanen, Christian A Lindensmith, Riley M Duren, Matthew P Golombek, Susan D J Foster, Peter M B Shames, Zareh Gorjian, Varoujan Gorjian, Kent Robert Crossin, Sharon L Laubach, Timothy P McElrath, Peter R Eisenhardt, James Kulleck, Robert M Nelson, Josette Bellan, Julia Bell, William Bruce Banerdt, Amy Snyder Hale, William John Walker, Celeste M Satter, CCA # 07-56424. Appellees motion to extend the stay of issuance of the mandate pending filing and disposition of a petition for writ of

DATE	DOCKET NUMBER	PROCEEDINGS
		certiorari is GRANTED. The mandate shall be stayed to and including October 8, 2009. If a petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court. IT IS SO ORDERED. (dmap) (Entered: 09/03/2009)
		* * * * *
9/30/09	125	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 43 filed by Dennis V Byrnes, Susan Paradise, Larry R D'Addario, Scott Maxwell, Amanda Mainzer, Robert J Haw, George Carlisle, Paul R Weissman, Konstantin Penanen, Christian A Lindensmith, Riley M Duren, Matthew P Golombek, Susan D J Foster, Peter M B Shames, Zareh Gorjian, Varoujan Gorjian, Kent Robert Crossin, Sharon L Laubach, Timothy P McElrath, Peter R Eisenhardt, James

DATE	DOCKET NUMBER	PROCEEDINGS
		Kulleck, Robert M Nelson, Josette Bellan, Julia Bell, William Bruce Banerdt, Amy Snyder Hale, William John Walker, Celeste M Satter, CCA # 07-56424. Appellees' motion to further extend the stay of issuance of the mandate pending filing and disposition of a petition for writ of certiorari is GRANTED. The mandate shall be stayed to and including November, 9, 2009. If a petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court. (dmap) (Entered: 10/01/2009)

* * * * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV07-05669-ODW-VBK

ROBERT M. NELSON, WILLIAM BRUCE BANERDT, JULIA BELL, JOSETTE BELLAN, DENNIS V. BYRNES, GEORGE CARLISLE, KENT ROBERT CROSSIN, LARRY R. D'ADDARIO, RILEY M. DUREN, PETER R. EISENHARDT, SUSAN D.J. FOSTER, MATTHEW P. GOLOMBEK, VAROUJAN GORJIAN, ZAREH GORJIAN, ROBERT J. HAW, JAMES KULLECK, SHARON L. LAUBACH, CHRISTIAN A. LINDENSMITH, AMANDA MAINZER, SCOTT MAXWELL, TIMOTHY P. MCELRATH, SUSAN PARADISE, KONSTANTIN PENANEN, CELESTE M. SATTER, PETER M.B. SHAMES, AMY SNYDER HALE, WILLIAM JOHN WALKER AND PAUL R. WEISSMAN, PLAINTIFFS

v.

NATIONAL AERONAUTICAL AND SPACE AGENCY, AN AGENCY OF THE UNITED STATES; MICHAEL GRIFFIN, DIRECTOR OF NASA, IN HIS OFFICIAL CAPACITY ONLY; DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, SECRETARY OF COMMERCE, IN HIS OFFICIAL CAPACITY ONLY; CALIFORNIA INSTITUTE OF TECHNOLOGY; AND DOES 1-100, DEFENDANTS

[Filed: Aug. 30, 2007]

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

I. VIOLATION OF FOURTH AMENDMENT RIGHTS

II. VIOLATION OF FOURTEENTH AMENDMENT RIGHTS

III. VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 706(2)(c)

IV. VIOLATION OF THE PRIVACY ACT, 5 U.S.C. § 522a

V. VIOLATION OF RIGHTS UNDER THE CALIFORNIA CONSTITUTION

VI. INJUNCTIVE AND DECLARATORY RELIEF

I. INTRODUCTION AND SUMMARY OF THE ACTION

1. Plaintiffs are leading scientists and engineers employed by the California Institute of Technology (Caltech) as staff at the Jet Propulsion Laboratory. They bring this action on behalf of themselves and a class of similarly situated employees to challenge NASA's requirement, under pain of loss of their jobs, that JPL employees—including senior scientists and engineers, many of whom have been employed there for decades, and none of whom work on classified or national security materials or issues—submit to 1) an open-ended background investigation prying into their protected associational activities as well as myriad private and irrelevant personal information, and 2) a determination of their suitability for employment that includes such wrong-headed and/or dangerously vague criteria as sexual ori-

entation, sexual history, medical and emotional history, financial history, "attitude," and "personality conflict." This action by NASA is putatively based upon Homeland Security Presidential Directive 12, an executive order concerned exclusively with the establishment of a common *identification* standard for federal employees and contractors, and which contemplates no additional background investigation or suitability determination beyond that already required by law. NASA's action violates, *inter alia*, plaintiffs' Constitutional rights to be free of unreasonable searches; to privacy; and violates the Administrative Procedure Act and the Privacy Act, as well as California's constitutional protections. Plaintiffs seek declaratory and injunctive relief, foreclosing further implementation of this background investigation program against JPL employees in non-sensitive positions.

II. JURISDICTION and VENUE

2. This Court has jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1331 (federal question jurisdiction).

III. PARTIES

A. The Plaintiffs

3. Dr. Robert Nelson is currently employed by Caltech as a Senior Research Scientist at NASA's Jet Propulsion Lab and has been employed at JPL for twenty seven years. He holds the rank of a Principal Scientist, the highest research classification at JPL, and currently leads NASA's New Millennium Program which tests or validates all new technology that NASA will use in space. Dr. Nelson is also a member of the nine person Senior Research Scientist Council at JPL, which represents the interests of the research community at JPL to

the JPL Chief Scientist and to the Director of JPL. Dr. Nelson is a resident of Los Angeles County. Dr. Nelson brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

4. Dr. William Bruce Banerdt is currently employed as a Principal Scientist at NASA's Jet Propulsion Laboratory, where he has worked since 1983. He serves as Project Scientist for the Mars Exploration Rovers Project, which involves both coordinating the scientists working on the mission, helping to develop and achieve the scientific goals for the mission, representing the needs of the mission scientists to project management and NASA and representing the project to the public. He has held various management positions at JPL, including Group Supervisor for Geophysics and Planetary Dynamics Group; Lead Scientist and Discipline Program Manager. Dr. Banerdt brings this suit on behalf of himself and all others similarly situated non-sensitive personnel employed by Caltech at JPL.

5. Dr. Julia Bell is currently employed by Caltech as a Senior Engineer in the Systems Engineering Section of the Systems and Software Division at NASA's Jet Propulsion Lab and has been employed there for the past 11 years. She has served as a member of the navigation team for the Mars Odyssey mission and the Mars Exploration Rover project, as well as a systems engineer on several other missions, including the Phoenix mission. Dr. Bell brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

6. Dr. Josette Bellan is currently employed by Caltech as a Senior Research Scientist at JPL, where she

has been employed since 1980. Dr. Bellan also holds a teaching position in Caltech in the Division of Engineering and Applied Sciences. For the past three years she has served as a member of the nine person Senior Research Scientist Council at JPL, which represents the interests of the research community at JPL to the JPL Chief Scientist and to the Director of JPL. Dr. Bellan brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

7. Dennis Byrnes is currently employed by Caltech as a Chief Engineer for Flight Dynamics at JPL, where he has worked for the past 30 years. This is the highest technical classification at JPL in the engineering field. He was one of the lead trajectory designers for numerous missions including the Galileo Project and the Apollo moon landings. Mr. Byrnes brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

8. George Carlisle is currently employed by Caltech as a Senior Member Technical Staff, Mission Design Section, at NASA's Jet Propulsion Laboratory, where he has worked since 1974. As a member of the Mission Design Section at JPL, he works with a team of scientists and engineers to determine what trajectory a spacecraft should travel to accomplish the goals set for it by mission scientists. Mr. Carlisle brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

9. Kent Crossin is currently employed as an Associate Engineer by Caltech at NASA's Jet Propulsion Laboratory, where he has worked since 2006. He performs hardware testing on the Multi-Mission System Architec-

ture Platform, and provides support to the Mars Science Laboratory, a flagship mission scheduled to launch in 2009. Mr. Crossin brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

10. Dr. Larry D'Addario is currently employed by Caltech as a Principal Engineer at NASA's Jet Propulsion Laboratory. He is an engineer in the Tracking Systems and Applications System, where his work focuses on designing new technologies for the Deep Space Network. Dr. D'Addario brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

11. Riley Duren is currently employed by Caltech at NASA's Jet Propulsion Laboratory as a Principal Systems Engineer, one of the highest rankings for engineers at JPL, where he has worked since 1996. He has served as Avionics Manager for the Champollion Comet Lander mission; and Chief Engineer for the Attitude and Orbit Determination Avionics subsystem on the Shuttle Radar Topography Mission, which generated a near-global map of the earth's surface to 10 meter vertical accuracy in a single 11 day flight. He has also served as the Project System Engineer for the Kepler space observatory, which will launch in 2009, where he leads a team of twenty senior engineers and scientists at JPL and other institutions. Mr. Duren brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

12. Peter Eisenhardt is currently employed by Caltech as a Principal Scientist at NASA's Jet Propulsion Laboratory, where he has worked since 1990. He is one of the principal scientists working on a mission known as

Wide-Field Infrared Survey Explorer, which will carry out an infrared survey of the entire sky and is planned for launch in 2009. Dr. Eisenhardt brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

13. Susan D.J. Foster is currently employed by Caltech as a Senior Technical Writer Specialist at NASA's Jet Propulsion Laboratory, where she has worked since 1968. Since 1978, she has served as technical editor and technical writer in JPL's Technical Information Section. Ms. Foster brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

14. Dr. Matthew Golombek is currently employed by Caltech as a Senior Research Scientist and Principal Scientist at NASA's Jet Propulsion Laboratory, where he has worked since 1983. Since 1983, he has been a continuously funded Principal Investigator in NASA's Planetary Geology and Geophysics and/or Mars Data Analysis programs; his work focuses on Mars geology and the prediction of surface characteristics from orbital remotely sensed data. Dr. Golombek is also a member of the nine person Senior Research Scientist Council at JPL, which represents the interests of the research community at JPL to the JPL Chief Scientist and to the Director of JPL. Dr. Golombek brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

15. Dr. Varoujan Gorjian is currently employed by Caltech as a research astronomer working primarily on the Spitzer Space Telescope at NASA's Jet Propulsion Laboratory, where he has worked since 2000. His research focuses on the study of black holes and the star

formation history of the universe. Dr. Gorjian brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

16. Zareh Gorjian is currently employed by Caltech as a Senior Programmer at NASA's Jet Propulsion Laboratory, where he has worked since 1990. He works in JPL's Digital Image Animation Laboratory, creating graphics for teams who are writing mission proposals, preparing mission visualizations for the public and creating visualizations of actual movements and activities of spacecraft in flight or at their destination. Mr. Gorjian brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

17. Dr. Amy Snyder Hale is currently employed by Caltech as a Technical Staff member at NASA's Jet Propulsion Laboratory, where she has worked since 2000. She has worked as an engineer on the Mars Global Surveyor mission, among other Mars missions, and has focused her scientific research on Mars atmospheric studies and Mars polar studies. Dr. Hale brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

18. Robert Haw is currently employed by Caltech as an engineer at NASA's Jet Propulsion Laboratory, where he has worked since 1987. While at JPL, he has participated in the navigation engineering team for the Magellan and Galileo Projects, as well as various new pre-launch mission design teams. Mr. Haw brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

19. Dr. James Kulleck is currently employed by Caltech as a senior member of the technical staff at NASA's Jet Propulsion Laboratory, where he has worked for more than 15 years. Dr. Kulleck provides materials analysis support for all of JPL's flight projects. Dr. Kulleck brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

20. Dr. Sharon Laubach is currently employed by Caltech as a Project Manager at NASA's Jet Propulsion Laboratory, where she has been employed since 1999. Since 2005, she has been the Mars Exploration Rover (MER) Integrated Sequencing Team Chief (Project Manager I), leading a team of 40 engineers who design, validate and compile all the command sequences used to operate the Mars rovers. Dr. Laubach brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

21. Dr. Christian Lindensmith is currently employed by Caltech as a Senior-A Member of the Technical Staff at NASA's Jet Propulsion Laboratory, where he has worked since 1996. His work at JPL focuses on the development of missions and instruments for the detection and characterization of Earth-like planets orbiting other stars, including leading the design of the Terrestrial Planet Finder mission. Dr. Lindensmith brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

22. Dr. Amanda Mainzer is currently employed by Caltech as a Research Scientist at NASA's Jet Propulsion Laboratory, where she has worked since 2003. She currently serves as the Deputy Project Scientist for the Wide Field Infrared Survey Explorer (WISE) mission,

a NASA space telescope that will launch in 2009. Dr. Mainzer brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

23. Scott Maxwell is currently employed by Caltech as a Senior Member of the Technical Staff at NASA's Jet Propulsion Laboratory, where he has worked for the past 13 years. For the past five years, he has worked on the Multi Mission Ground Data System, an extensive collection of software that provides data analysis and spacecraft commanding capabilities for most JPL projects. Mr. Maxwell brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

24. Timothy McElrath is currently employed by Caltech as Technical Group Supervisor and Principal Engineer at NASA's Jet Propulsion Laboratory, where he has been employed since 1988. His work at JPL has primarily consisted of orbit determination analysis on numerous spacecraft, including Galileo and the Mars Exploration Rovers. Mr. McElrath brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

25. Susan Paradise is currently employed by Caltech at NASA's Jet Propulsion Laboratory, where she has been employed for over 22 years. After many years as the lead software developer for the MISR (Multi-angle Imaging Spectro-Radiometer) Project, she was promoted to Project Element Manager in 2001 for the Tropospheric Emission Spectrometer Project, where she managed the design, development and testing of ground data system software for five years. In April 2006, she returned to the MISR to continue to manage the Level

2 Aerosol/Surface Team and in April 2007, joined the Aerosol Measurement Processing System as a scientific programmer and analyst. Ms. Paradise brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

26. Dr. Konstantin Penanen is currently employed by Caltech as a scientist at NASA's Jet Propulsion Laboratory, where he has worked since 2004. He is the JPL Co-Principal Investigator on a project studying the fundamental properties of quantum fluids at low temperatures and is working to develop a light-weight, low power MRI with potential spin-off uses in mobile hospitals. Dr. Penanen brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

27. Celeste Satter is currently employed by Caltech as a Senior Engineer in the Mission Systems Concepts Section at NASA's Jet Propulsion Laboratory, where she has worked since 1987. She currently is working on JPL's Single-Aperture Far-Infrared Observatory Concept Study, in a mission and program architecture role and on the Small Explorer mission proposal which is in the development stages. Ms. Satter brings this suit on behalf of herself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

28. Peter Shames is currently employed by Caltech as a Manager of the Data Systems Standards Program at NASA's Jet Propulsion Laboratory, where he has worked since 1991. At JPL he has held a variety of senior system architect and management positions, including group supervisor the Infrared Processing and Analysis Center (IPAC), system architect during the Multimission Image Processing Lab (MIPL) redesign, system

architect for the Multi-mission Ground Systems Office (MGSO), and mission service technology program manager in the Telecommunications and Mission Operations Directorate (TMOD). In his current role of manager of the JPL Data Systems Standard Program he leads an international program of work to develop space communications and navigation standards for interoperability. Dr. Shames brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

29. John Walker is currently employed by Caltech as a Senior Engineer at NASA's Jet Propulsion Laboratory, where he has worked since 1990. During his tenure at JPL, Mr. Walker has served as Lead Control System Engineer on two major JPL spacecraft projects: the Cassini Mission to Saturn and the Space Interferometry Mission. Mr. Walker brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

30. Dr. Paul Weissman is currently employed by Caltech as a Senior Research Scientist at NASA's Jet Propulsion Laboratory, where he has worked for the past 33 years specializing in the study of physics and dynamics of small bodies in the solar system, in particular comets and asteroids. He served as Deputy Project Scientist for the Comet Rendezvous and Asteroid Flyby mission, and assisted on the Galileo and other missions. Dr. Weissman brings this suit on behalf of himself and all other similarly situated non-sensitive personnel employed by Caltech at JPL.

B. The Defendants

31. Defendant National Aeronautics and Space Administration ("NASA") is a federal agency which was created by the National Aeronautics and Space Act of 1958, as a purely civilian agency. Pub. L. 85-568, § 102, 72 Stat. 433.

32. Defendant Michael Griffin is the director of NASA and is sued in his official capacity only.

33. Defendant California Institute of Technology ("Caltech") is a non-profit educational institution and one of the premier research institutes in the world. Caltech is located in Los Angeles County. The Jet Propulsion Laboratory is an operating division of Caltech, staffed entirely by Caltech employees whose compensation and benefit policies are established by Caltech.

34. Defendant Department of Commerce is a department of the Federal Government.

35. Defendant Carlos M. Gutierrez is Secretary of Commerce and is sued in his official capacity only.

36. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as DOES 1-100, inclusive, and therefore sue these defendants by such fictitious names and capacities. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. Plaintiffs are informed and believe and on that basis allege, that each fictitiously named defendant is responsible in some manner for the occurrence herein alleged and that the injuries to plaintiffs herein alleged were proximately caused by the conduct of such defendants.

IV. FACTUAL ALLEGATIONS

37. Since 1959, Caltech has operated JPL pursuant to a written contract as a NASA Federally Funded Research and Development Center (FFRDC) "to meet certain Government research and development needs which could not be met effectively by existing Government resources or normal contractor relationships." The laboratories' actual physical facilities are owned by NASA.

38. Plaintiffs are long-term employees of Caltech, many of whom have worked at the JPL facilities in Pasadena on NASA-related scientific research and engineering projects for more than twenty years. None of them have security clearances nor do they work with classified material of any kind. Many of the plaintiffs, only agreed to work for NASA with the understanding that they would not have to work on classified materials or to undergo any type of security clearance. For all of the plaintiffs who conduct research, their research data (collected from NASA missions and instruments) is part of the public domain and their findings are freely shared with the scientific community and the public. Indeed, many of the plaintiffs have elected to work only on non-classified work expressly so their research can be subject to peer review, they can collaborate with the best scientists worldwide and publish their results. Because of this policy of non-classified work and public distribution of scientific data and findings, NASA attracts many of the world's top scientists who want to do research in a completely open environment.

39. On August 27, 2004, the President signed Homeland Security Presidential Directive 12 (HSPD-12), entitled "Policy for a Common Identification Standard for Federal Employees and Contractors," applicable to all

Executive Branch departments and agencies. The express purpose of HSPD-12 is to ensure that "secure and reliable forms of identification" are used by government employees and contractors. HSPD-12 directed that the Secretary of Commerce promulgate a Federal standard for "secure and reliable forms of identification" within six months of the directive. HSPD-12 defined "secure and reliable forms of identification" to mean identification that is (a) "issued based on sound criteria for verifying an individual employee's identity;" (b) "strongly resistant to identity fraud, tampering, counterfeiting and terrorist exploitation;" (c) "can be rapidly authenticated electronically;" and (d) "is issued only by providers whose reliability has been established by an official accreditation process."

40. Nowhere does HSPD-12 authorize or require implementation of a background investigation process for current or new federal employees or contractors, nor does it authorize or contemplate any requirement that applicants for the new federal identification standard waive any of their privacy rights. Indeed, HSPD-12 expressly states that it "shall be implemented in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a) and other statutes protecting the rights of Americans."

41. In response to HSPD-12, in March 2006, the U.S. Department of Commerce published the Federal Information Processing Standard Publication (FIPS PUB 201-1), entitled "Personal Identify Verification (PIV) of Federal Employees and Contractors" hereafter ("PIV Standard"). The PIV Standard explained that it was issued in response to HSPD-12 and that its sole authority was based on that presidential directive. While stat-

ing that the Standard sought to meet the four criteria set forth in HSPD-12, the Commerce Department proceeded to impose a background investigation requirement on all employees or contractors seeking to obtain the new form of identification. Despite the absence of any such directive in HSPD-12, the PIV Standard mandates that "only an individual with a background investigation on record is issued a credential." The PIV Standard further specifies that the background investigation required will be a "National Agency Check *with Inquiries*," or its equivalent, for which each applicant will be required to complete Standard Form (SF) 85, "OPM Questionnaire for Non-Sensitive Positions," or its equivalent.

42. Working separately to respond to HSPD-12, in 2006 NASA had instituted an identification badge system which required JPL (and other NASA employees) to obtain new badges, which could be used throughout NASA facilities. To obtain one of these new identification badges, JPL employees were required to complete four forms, requiring that they provide basic information such as current address, date and place of birth, social security number, height and weight and former names, submit two forms of approved identification (one of which had to be a state or federal issued identification) and submit to fingerprinting. None of the forms required that JPL employees provide detailed information about their work, residential or personal history, provide names of references for interviews about their suitability, or waive their privacy rights in anyway. As a group, Plaintiffs had no objection to this rebadging process, which fully met the objectives of HSPD-12 and posed no significant invasion of their privacy rights.

43. Despite its implementation of the OneNASA badge, on or about May 24, 2007, NASA issued NASA Interim Directive (NPR 1600.l), establishing a new "Agency-wide policy for the creation and issuance of federal credentials at NASA." The Directive stated that it was being implemented in compliance with HSPD-12 and the Federal Information Processing Standards Publication Number 201-1 (FIPS 201). The directive required that all individuals who require physical access to NASA resources for a period of greater than 179 days obtain a new identification badge, known as the PIV or PIV II. All JPL personnel were informed that to receive the newly required PIV badge they would have to submit to a background investigation, the extent of which would be determined by their position's risk level.

44. As part of the implementation of the new PIV system, NASA and JPL jointly established the risk level for each position at JPL based on "the position's impact on NASA operations." Each position was designated as "high, moderate or low risk," based on the "overall responsibility of the position" and "any possible adverse impact the position could have in terms of integrity and efficiency of NASA assets/operations." All employees determined to be low risk level were required to complete Standard Form SF 85 and submit to a background check known as a "National Agency Check with Inquiries" ("NACI"). Low risk positions are those positions which "have little affect on the efficiency of the agency's programs and operations" and would include all "non-sensitive positions and all other positions involving IT systems whose misuse has limited potential for adverse impact." Moderate and high risk employees were required to complete Standard Form SF 85 P and submit to a more extensive background investigation.

45. All of the plaintiffs in this case have been notified that they have been deemed "non-sensitive personnel" by NASA and JPL and therefore required to complete Form SF 85.

46. Approximately 97% of JPL personnel have been designated as "non-sensitive personnel" by JPL and NASA.

47. Standard Form SF 85 requires that plaintiffs provide various types of background information to which there is no objection, e.g. name, date of birth, place of birth, social security number, etc. The form also requires that they provide information about their employment and residential history for the last five years, as well as their education starting with highschool; provide the names of three individuals with whom they associate who know them well; and state whether they have used illegal drugs in the past year, none of which information is mentioned or contemplated by HSPD-12. (A true and correct copy of Form 85 is attached hereto as Exhibit 1.)

48. As an essential part of Form 85, employees are required to sign an "Authorization for Release of Information," which authorizes "any investigator, special agent or other duly accredited representative of the authorized Federal agency conducting my background investigation to obtain *any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information.* This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history and criminal record information. . . . I authorize custodians of re-

cords and sources of information pertaining to me to release such information upon request of the investigator, special agent, or other duly accredited representative . . . regardless of any previous agreement to the contrary."

49. All JPL employees have been informed that they must sign the authorization "without any modification or alteration."

50. The background investigation required of JPL personnel in non-sensitive positions is known as an NACI, or National Agency Check with Inquiries. None of the plaintiffs have previously undergone a NACI background investigation, nor have they ever been informed that in order to work at JPL that they would have to waive any of their privacy rights or be subjected to a backg ound investigation. Many of the plaintiffs had been required to submit to the more basic National Agency Check ("NAC"), which merely required that they provide their name, social security number and current address, but did not require any inquiries to be made of former employers, neighbors, or references, nor did it include any privacy waiver.

51. As part of the newly instituted background investigation, JPL employees are required to provide the names of three references, as well as their past employers and landlords for the past 5 years. Those individuals are then sent an Investigative Request for Personal Information (Form No. 42), which asks that they report any adverse information they have on the plaintiff with respect to "abuse of alcohol or drugs," "financial integrity," "mental or emotional stability," "general behavior or conduct," and "other matters." (A true and correct copy of Form No. 42 is attached hereto as Exhibit 2.)

52. NASA's Interim Directive regarding the implementation of the background investigation states that if the Badge issuance process yields any "derogatory or unfavorable information," it will be forwarded to the Human Relations Officer for JPL who will determine "employment suitability." In public meetings regarding the implementation process, JPL employees have been informed that the adjudication of their suitability, based on the background check, will instead be performed by a "federal employee," not shared with JPL and a negative outcome "would prevent [the] individual from access to a federal facility."

53. JPL has posted on its internal website a chart, setting forth all of the grounds for which an employee could be determined to be unsuitable for access to the JPL facilities. That chart includes "infrequent, irregular but deliberate delinquency in meeting financial obligations," "pattern of irresponsibility as reflected in . . . credit history," "sexual misconduct with impact on job," "sodomy," "attitude," "personality conflict," "absenteeism or attendance problem," "homosexuality," "judgment, reliability and dependability issues," "physical health issues," "mental, emotional, psychological or psychiatric issues," "issues . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation." (A true and correct copy of the Suitability Chart is attached hereto as Exhibit 3.)

54. JPL employees have been informed by JPL senior management that no employee will be admitted to JPL facilities without a new PIV badge after October 27, 2007. Further, they have been informed that if they do not complete all of the paperwork (Form 85 and waiver)

by September 28, 2007, JPL will be unable to process their requests by October 27, 2007 and they will be barred from the premises on that date.

55. All of the plaintiffs have been informed at public meetings that if they do not have their PIV badge by October 27, 2007, that they will not only be barred from the premises but will be deemed to have terminated their employment with JPL.

56. All of the plaintiffs will suffer irreparable harm if they are denied access to JPL and deemed to have voluntarily resigned from employment with Caltech as they will lose their livelihood and medical benefits. For several of the plaintiffs, who are over 60, it may be difficult to find replacement jobs. For all of the plaintiffs, loss of their position at JPL will deprive them of a unique and irreplaceable job, which will imperil their ability to continue their research and to remain active in space exploration. Indeed, for all of the plaintiffs there is no comparable job in the world, as JPL is the premier institution for exploration of space.

57. Of equal if not greater significance, JPL, NASA and Caltech will suffer irreparable harm if they lose these key employees, many of whom play indispensable roles on current space exploration missions and are irreplaceable because of their knowledge, experience, and intimate involvement with these missions over the past years, including key personnel on the Mars Exploration Rover mission and other critical programs.

58. In addition, NASA will be deprived of talented scientists and engineers who will be deterred from applying to work at JPL because of the newly-required background investigation and waiver of privacy rights, both of which are antithetical to the type of autonomy

and academic freedom needed to maintain JPL's status as the preeminent research institution for space exploration. Some employees have already announced their resignation or retirement over this issue; others are already seeking work outside of JPL. JPL is already experiencing a shortage of experience in Mars science and has experienced difficulties recruiting senior talented scientists in this area, which will be compounded by the departure of these key scientists and engineers.

V. CLASS ACTION ALLEGATIONS

59. Plaintiffs incorporate by reference paragraphs 1 - 57 of this Complaint as if set forth herein.

60. Plaintiffs bring this action individually and on behalf of a class of JPL employees in non-sensitive positions. There are approximately 5000 employees of Caltech at JPL, approximately 97% of which have been designated by NASA as non-sensitive personnel.

61. The class members identified are so numerous that joinder of all members is impracticable. Plaintiffs believe that there are thousands of members in the class.

62. There are questions of law and facts common to the class. Such common questions include but are not limited to, the following:

a. Whether and to what extent Plaintiffs' constitutionally protected privacy rights are being violated by the requirement that they complete Form 85, sign the waiver that is part of that form, and submit to a NACI background investigation.

b. Whether and to what extent Plaintiffs' constitutionally protected rights to be free from unlawful

searches and seizures are violated by the requirement that they complete Form 85, sign the waiver that is part of that form, and submit to a NACI background investigation.

c. Whether the Secretary of Commerce and Commerce Department violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(c), by imposing a background investigation on employees of government contractors which has no basis in HSPD-12, or in any other executive order or statute.

d. Whether Defendants' policy directly violates several sections of the Privacy Act of 1974, codified at 5 U.S.C. §§ 552a(a)-(q), which requires departments and agencies of the executive branch to observe certain rules in the computerization, collection, management, use, and disclosure of personal information about individuals.

63. Plaintiffs' claims are typical of the claims of the class. Plaintiffs seek redress for the same conduct that has affected all Proposed Class Members and press legal claims which are the same for all Proposed Class Members.

64. Plaintiffs are all members of the class they seek to represent and will fairly and adequately represent the class. Plaintiffs do not have conflicts of interest with members of the class and have retained counsel who are experienced in complex litigation, including class actions and constitutional litigation, who will vigorously prosecute this action.

65. A class action is the superior method for adjudication of this controversy. In the absence of a class action, courts will be unnecessarily burdened with multi-

ple, duplicative individual actions. Moreover, this action is properly maintainable as a class action because Defendants have acted and/or refused to act on grounds generally applicable to the Proposed Class, thereby making equitable relief appropriate to the Proposed Class as a whole. Questions of law and fact common to the class also predominate over any questions affecting only individual members.

VI. CAUSES OF ACTION

FIRST CAUSE OF ACTION

VIOLATION OF U.S. CONSTITUTION, FOURTH AMENDMENT

(UNREASONABLE SEARCH AND SEIZURE)

On Behalf of all Plaintiffs and Proposed Class Members against all defendants

66. Plaintiffs incorporate by reference paragraphs 1 - 65 of this Complaint as if set forth herein.

67. In perpetrating the above described acts and omissions, defendants, and each of them, have violated, or threatened to violate, the rights of plaintiffs and the class which they seek to represent to be free from unreasonable searches and seizures, as protected by the Fourth Amendment of the United States Constitution.

68. Unless and until defendants' unlawful policies and practices as alleged herein are enjoined and restrained by order of this court, defendants will continue to cause great and irreparable injury to plaintiffs. Plaintiffs have no plain, speedy, or adequate remedy at law, in that it is difficult to measure the amount of monetary damages that would compensate them for the

wrongful acts of defendants and, in any event, pecuniary compensation alone would not afford them adequate and complete relief.

SECOND CAUSE OF ACTION

VIOLATION OF U.S. CONSTITUTION, FOURTEENTH AMENDMENT

(INVASION OF RIGHT TO PRIVACY)

On Behalf of all Plaintiffs and Proposed Class Members against all defendants

69. Plaintiffs incorporate by reference paragraphs 1 - 68 of this Complaint as if set forth herein.

70. In perpetrating the above described acts and omissions, defendants, and each of them, have violated, or threatened to violate, the privacy rights of plaintiffs and the class which they seek to represent, as protected by the Fourteenth Amendment of the United States Constitution.

71. Unless and until defendants' unlawful policies and practices as alleged herein are enjoined and restrained by order of this court, defendants will continue to cause great and irreparable injury to plaintiffs. Plaintiffs have no plain, speedy, or adequate remedy at law, in that it is difficult to measure the amount of monetary damages that would compensate them for the wrongful acts of defendants and, in any event, pecuniary compensation alone would not afford them adequate and complete relief.

THIRD CAUSE OF ACTION

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT,

5 U.S.C. § 706(2)(c)

On Behalf of all Plaintiffs and all Class Members Against Secretary Gutierrez, Department of Commerce, and Does 1-100

72. Plaintiffs incorporate by reference paragraphs 1 - 69 of this Complaint as if set forth herein.

73. In perpetrating the above described acts and omissions, defendants Department of Commerce and Carlos M. Gutierrez, Secretary of Commerce, and each of them, have violated and continue to violate the Administrative Procedure Act, 5 U.S.C. § 706(2)(c), by imposing a background investigation on employees of government contractors which has no basis in HSPD-12, or in any other executive order or statute.

74. Unless and until defendants' unlawful policies and practices as alleged herein are enjoined and restrained by order of this court, defendants will continue to cause great and irreparable injury to plaintiffs. Plaintiffs have no plain, speedy, or adequate remedy at law, in that it is difficult to measure the amount of monetary damages that would compensate them for the wrongful acts of defendants and, in any event, pecuniary compensation alone would not afford them adequate and complete relief.

FOURTH CAUSE OF ACTION

VIOLATION OF PRIVACY ACT, 5 U.S.C. § 552a

On Behalf of all Plaintiffs and all Class Members against all Defendants

75. Plaintiffs incorporate by reference paragraphs 1 - 74 of this Complaint as if set forth herein.

76. In perpetrating the above described acts and omissions, defendants, and each of them, have violated and continue to violate the Privacy Act, 5 U.S.C. § 552a, by imposing a background investigation on employees of government contractors in violation of that Act. Specifically, the defendants' conduct violates:

a. Section 552a(e)(l) of the Act, which requires that a federal agency "maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;" and

b. Section (e)(7) of the Privacy Act, which prohibits a government agency from maintaining records that describing "how any individual exercises rights guaranteed by the First Amendment" unless expressly authorized by statute; by the individual in question; or unless "pertinent to and within the scope of an authorized law enforcement activity."

c. Section (b) of the Privacy Act, which provides that no "agency may disclose any record which is contained in a system of records . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains," in that plaintiffs have been informed that the information col-

lected will be shared with Caltech and potentially other government agencies.

77. Unless and until defendants' unlawful policies and practices as alleged herein are enjoined and restrained by order of this court, defendants will continue to cause great and irreparable injury to plaintiffs. Plaintiffs have no plain, speedy, or adequate remedy at law, in that it is difficult to measure the amount of monetary damages that would compensate them for the wrongful acts of defendants and, in any event, pecuniary compensation alone would not afford them adequate and complete relief.

FIFTH CAUSE OF ACTION

VIOLATION OF RIGHTS UNDER THE CALIFORNIA CONSTITUTION

On Behalf of all Plaintiffs and all Class Members Against all Defendants

78. Plaintiffs refer to paragraphs 1 through 77 of this complaint and incorporate those paragraphs here, as though set forth in full.

79. In perpetrating the above described acts and omissions, defendants, and each of them, have violated provisions of the California Constitution, depriving plaintiffs of their rights thereunder. These include, the right to be free from unreasonable searches and seizures as protected under Article I, § 13 of the California Constitution, and the right to be free from invasions of one's privacy, as protected under Article I, § 1 of the California Constitution.

80. Unless and until defendants' unlawful policies and practices as alleged herein are enjoined and re-

strained by order of this court, defendants will continue to cause great and irreparable injury to plaintiffs. Plaintiffs have no plain, speedy, or adequate remedy at law, in that it is difficult to measure the amount of monetary damages that would compensate them for the wrongful acts of defendants and, in any event, pecuniary compensation alone would not afford them adequate and complete relief.

SIXTH CAUSE OF ACTION

INJUNCTIVE AND DECLARATORY RELIEF

On behalf of all Plaintiffs and all Class Members' Against All Defendants

81. The allegations set forth in paragraphs 1 through 77 of this complaint are realleged and incorporated by reference as if fully set forth herein.

82. As a result of defendants' conduct, plaintiffs and all others similarly situated have been injured, and in the absence of injunctive relief, will be irreparably harmed. Plaintiffs and all others similarly situated have no adequate remedy at law. Plaintiffs therefore seek injunctive relief under the laws of equity to remedy their injuries and prevent any future injury to their persons, or to all those similarly situated.

80. There is an actual controversy between all plaintiffs and the defendants, and plaintiffs seek a declaration of their rights to be free of coercion by the defendants, and each of them.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court to:

(a) enter judgment in favor of Plaintiffs on all counts of the Complaint;

(b) award Plaintiffs injunctive relief;

(c) award Plaintiffs the costs of suit including reasonable attorneys' fees; and

(d) award Plaintiffs such other and further relief as the Court deems just under the circumstances.

DATED: August 29, 2007

Respectfully Submitted,

HADSELL & STORMER, INC.

By: /s/ VIRGINIA KEENY
VIRGINIA KEENY, ESQ.
Attorneys for Plaintiffs
Robert M. Nelson,
William Bruce Banerdt, et al.

Standard Form 85
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731 and 736

Form approved
OMB No. 3206-0005
NSN 7540-00-634-4035
85-111

Questionnaire for Non-Sensitive Positions

Follow instructions fully or we cannot process your form. Be sure to sign and date the certification statement on Page 5 and the release on Page 6. If you have any questions, call the office that gave you the form.

Purpose of this Form

The U.S. Government conducts background investigations to establish that applicants or incumbents either employed by the Government or working for the Government under contract, are suitable for the job. Information from this form is used primarily as the basis for this investigation. Complete this form only after a conditional offer of employment has been made.

Giving us the information we ask for is voluntary. However, we may not be able to complete your investigation, or complete it in a timely manner, if you don't give us each item of information we request. This may affect your placement or employment prospects.

Authority to Request this Information

The U.S. Government is authorized to ask for this information under Executive Order 10577, sections 3301 and 3302 of title 5, U.S. Code; and parts 5, 731, and 736 of Title 5, Code of Federal Regulations.

Your Social Security Number is needed to keep records accurate, because other people may have the same name and birth date. Executive Order 9397 also asks Federal agencies to use this number to help identify individuals in agency records.

The Investigative Process

Background investigations are conducted using your responses on this form and on your Declaration for Federal Employment (OF 306) to develop information to show whether you are reliable, trustworthy, and of good conduct and character. Your current employer must be contacted as part of the investigation, even if you have previously indicated on applications or other forms that you do not want this.

Instructions for Completing this Form

1. Follow the instructions given to you by the person who gave you the form and any other clarifying instructions furnished by that person to assist you in completion of the form. Find out how many copies of the form you are to turn in. You must sign and date, in black ink, the original and each copy you submit.

2. Type or legibly print your answers in black ink (if your form is not legible, it will not be accepted). You may also be asked to submit your form in an approved electronic format.

3. All questions on this form must be answered. If no response is necessary or applicable, indicate this on the form (for example, enter "None" or "N/A"). If you find that you cannot report an exact date, approximate or estimate the date to the best of your ability and indicate this by marking "APPROX." or "EST."

4. Any changes that you make to this form after you sign it must be initialed and dated by you. Under certain limited circumstances, agencies may modify the form consistent with your intent.

5. You must use the State codes (abbreviations) listed on the back of this page when you fill out this form. Do not abbreviate the names of cities or foreign countries.

6. The 5-digit postal ZIP codes are needed to speed the processing of your investigation. The office that provided the form will assist you in completing the ZIP codes.

7. All telephone numbers must include area codes.

8. All dates provided on this form must be in Month/Day/Year or Month/Year format. Use numbers (1-12) to indicate months. For example, June 10, 1978, should be shown as 6/10/78.

9. Whenever "City (Country)" is shown in an address block, also provide in that block the name of the country when the address is outside the United States.

10. If you need additional space to list your residences or employments/self-employments/unemployment or education, you should use a continuation sheet, SF 86A. If additional space is needed to answer other items, use a blank piece of paper. Each blank piece of paper you use must contain **your name and Social Security Number at the top of the page.**

Final Determination on Your Eligibility

Final determination on your eligibility for a position is the responsibility of the Office of Personnel Management or the Federal agency that requested your investigation. You may be provided the opportunity personally to explain, refute, or clarify any information before a final decision is made.

Penalties for Inaccurate or False Statements

The U.S. Criminal Code (title 18, section 1001) provides that knowingly falsifying or concealing a material fact is a felony which may result in fines of up to $10,000, and/or 5 years imprisonment, or both. In addition, Federal agencies generally fire, or disqualify individuals who have materially and deliberately falsified these forms, and this remains a part of the permanent record for future placements. Your trustworthiness is a very important consideration in deciding your suitability. Your prospects of placement are better if you answer all questions truthfully and completely. You will have adequate opportunity to explain any information you give us on the form and to make your comments part of the record.

Disclosure of Information

The information you give us is for the purpose of determining your suitability for Federal employment; we will protect it from unauthorized disclosure. The collection, maintenance, and disclosure of background investigative information is governed by the Privacy Act. The agency which requested the investigation and the agency which conducted the investigation have published notices in the Federal Register describing the systems of records in which your records will be maintained. You may obtain copies of the relevant notices from the person who gave you this form. The information on this form, and information we collect during an investigation may be disclosed without your consent as permitted by the Privacy Act (5 USC 552a(b)) and as follows:

PRIVACY ACT ROUTINE USES

1. To the Department of Justice when: (a) the agency or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States Government, is a party to litigation or has interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records by the Department of Justice is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

2. To a court or adjudicative body in a proceeding when: (a) the agency or any component thereof, or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States Government is a party to litigation or has interest in such litigation, and by careful review, the agency determines that the records are both relevant and necessary to the litigation and the use of such records is therefore deemed by the agency to be for a purpose that is compatible with the purpose for which the agency collected the records.

3. Except as noted in Question 14, when a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute, particular program statute, regulation, rule, or order issued pursuant thereto, the relevant records may be disclosed to the appropriate Federal, foreign, State, local, tribal, or other public authority responsible for enforcing, investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order.

4. To any source or potential source from which information is requested in the course of an investigation concerning the hiring or retention of an employee or other personnel action, or the issuing or retention of a security clearance, contract, grant, license, or other benefit, to the extent necessary to identify the individual, inform the source of the nature and purpose of the investigation, and to identify the type of information requested.

5. To a Federal, State, local, foreign, tribal, or other public authority the fact that this system of records contains information relevant to the retention of an employee, or the retention of a security clearance, contract, license, grant, or other benefit. The other agency or licensing organization may then make a request supported by written consent of the individual for the entire record if it so chooses. No disclosure will be made unless the information has been determined to be sufficiently reliable to support a referral to another office within the agency or to another Federal agency for criminal, civil, administrative, personnel, or regulatory action.

6. To contractors, grantees, experts, consultants, or volunteers when necessary to perform a function or service related to this record for which they have been engaged. Such recipients shall be required to comply with the Privacy Act of 1974, as amended.

7. To the news media or the general public, factual information the disclosure of which would be in the public interest and which would not constitute an unwarranted invasion of personal privacy.

8. To a Federal, State, or local agency, or other appropriate entities or individuals, or through established liaison channels to selected foreign governments, in order to enable an intelligence agency to carry out its responsibilities under the National Security Act of 1947 as amended, the CIA Act of 1949 as amended, Executive Order 12333 or any successor order, applicable national security directives, or classified implementing procedures approved by the Attorney General and promulgated pursuant to such statutes, orders or directives.

9. To a Member of Congress or to a Congressional staff member in response to an inquiry of the Congressional office made at the written request of the constituent about whom the record is maintained.

10. To the National Archives and Records Administration for records management inspections conducted under 44 USC 2904 and 2906.

11. To the Office of Management and Budget when necessary to the review of private relief legislation.

STATE CODES (ABBREVIATIONS)

Alabama	AL	Hawaii	HI	Massachusetts	MA	New Mexico	NM	South Dakota	SD
Alaska	AK	Idaho	ID	Michigan	MI	New York	NY	Tennessee	TN
Arizona	AZ	Illinois	IL	Minnesota	MN	North Carolina	NC	Texas	TX
Arkansas	AR	Indiana	IN	Mississippi	MS	North Dakota	ND	Utah	UT
California	CA	Iowa	IA	Missouri	MO	Ohio	OH	Vermont	VT
Colorado	CO	Kansas	KS	Montana	MT	Oklahoma	OK	Virginia	VA
Connecticut	CT	Kentucky	KY	Nebraska	NE	Oregon	OR	Washington	WA
Delaware	DE	Louisiana	LA	Nevada	NV	Pennsylvania	PA	West Virginia	WV
Florida	FL	Maine	ME	New Hampshire	NH	Rhode Island	RI	Wisconsin	WI
Georgia	GA	Maryland	MD	New Jersey	NJ	South Carolina	SC	Wyoming	WY
American Samoa	AS	District of Columbia	DC	Guam	GU	Northern Marianas	CM	Puerto Rico	PR
Trust Territory	TT	Virgin Islands	VI						

PUBLIC BURDEN INFORMATION

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Reports and Forms Management Officer, U.S. Office of Personnel Management, 1900 E Street, N.W., Room CHP-500, Washington, D.C. 20415. Do not send your completed form to this address.

Standard Form 85 (EG)
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731 and 736

QUESTIONNAIRE FOR NON-SENSITIVE POSITIONS

Form approved:
OMB No. 3206-0005
NSN 7540-00-634-4035
85-111

OPM USE ONLY — Codes — Case Number

Agency Use Only *Complete items A through K using instructions provided by USOPM*

A Type of Investigation	B Extra Coverage	C Nature of Action Code	D Date of Action (Month / Day / Year)

E Geographic Location	F Position Title	G SON	H SOI

I OPAC-ALC Number	J Accounting Data and/or Agency Case Number

K Requesting Official: Name and Title	Signature	Telephone Number	Date
		( )	

Persons completing this form should begin with the questions below.

1 FULL NAME • If you have only initials in your name, use them and state (IO). • If you have no middle name, enter "NMN". - If you are a "Jr.," "Sr.," "II," etc., enter this in the box after your middle name

2 DATE OF BIRTH

Last Name	First Name	Middle Name	Jr., II, etc	Month	Day	Year

3 PLACE OF BIRTH - Use the two letter code for the State.

City	County	State	Country (if not in the United States)

4 SOCIAL SECURITY

5 OTHER NAMES USED
Give other names you used and the period of time you used them *(for example: your maiden name, name(s) by a former marriage, former name(s), alias(es), or nickname(s))*. If the other name is your maiden name, put "nee" in front of it.

	Name	Month/Year	Month/Year
#1			To
#2			To
#3			To
#4			To

6 SEX *(Mark one box)* Female ☐ Male ☐

7 CITIZENSHIP

8 Mark the box at the right that reflects your current citizenship status, and follow its instructions.

- ☐ I am a U.S. citizen or national by birth in the U.S. or U.S. territory/possession. *(Answer items b and d)*
- ☐ I am a U.S. citizen, but I was NOT born in the U.S. *(Answer items b, c and d)*
- ☐ I am not a U.S. citizen. *(Answer items b and e)*

b Your Mother's Maiden Name

c UNITED STATES CITIZENSHIP If you are a U.S. citizen, but were not born in the U.S., provide information about one or more of the following proofs of your citizenship.

Naturalization Certificate *(Where were you naturalized?)*

Court	City	State	Certificate Number	Month/Day/Year Issued

Citizenship Certificate *(Where was the certificate issued?)*

City	State	Certificate Number	Month/Day/Year Issued

State Department Form 240 - Report of Birth Abroad of a Citizen of the United States

Give the date the form was prepared and give an explanation if needed	Month/Day/Year	Explanation

U.S. Passport

This may be either a current or previous U.S. Passport.

Passport Number	Month/Day/Year Issued

d DUAL CITIZENSHIP If you are (or were) a dual citizen of the United States and another country, provide the name of that country in the space to the right. — Country:

e ALIEN If you are an alien, provide the following information:

Place You Entered the United States:	City	State	Date You Entered U.S. Month	Day	Year	Alien Registration Number	Country(ies) of Citizenship

Exception to SF85, SF85P, SF85P-S, SF86, and SF86A approved by GSA September, 1995
Designed using Perform Pro, WHS/DIOR, Sep 95

90

8 WHERE YOU HAVE LIVED

List the places where you have lived, beginning with the most recent (#1) and working back 5 years. All periods must be accounted for in your list. Be sure to indicate the actual physical location of your residence: do not use a post office box as an address, do not list a permanent address when you were actually living at a school address, etc. Be sure to specify your location as closely as possible; for example, do not list only your base or ship, list your barracks number or home port. You may omit temporary military duty locations under 90 days (list your permanent address instead), and you should use your APO/FPO address if you lived overseas.

For any address in the last 3 years, list a person who knew you at that address, and who preferably still lives in that area (do not list people for residences completely outside this 3-year period, and do not list your spouse, former spouses, or other relatives).

#1 Month/Year To Present	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
Name of Person Who Knows You		Street Address	Apt. #	City (Country)	State	ZIP Code
#2 Month/Year To	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
Name of Person Who Knew You		Street Address	Apt. #	City (Country)	State	ZIP Code
#3 Month/Year To	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
Name of Person Who Knew You		Street Address	Apt. #	City (Country)	State	ZIP Code
#4 Month/Year To	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
Name of Person Who Knew You		Street Address	Apt. #	City (Country)	State	ZIP Code
#5 Month/Year To	Month/Year	Street Address	Apt. #	City (Country)	State	ZIP Code
Name of Person Who Knew You		Street Address	Apt. #	City (Country)	State	ZIP Code

9 WHERE YOU WENT TO SCHOOL

List the schools you have attended, beyond Junior High School, **beginning with the most recent (#1) and working back 5 years.** List all College or University degrees and the dates they were received. If all of your education occurred more than 5 years ago, list your most recent education beyond high school, no matter when that education occurred.

- Use one of the following codes in the "Code" block:

1 - High School 2 - College/University/Military College 3 - Vocational/Technical/Trade School

- For correspondence schools and extension classes, provide the address where the records are maintained.

#1 Month/Year To	Month/Year	Code	Name of School	Degree/Diploma/Other	Month/Year Awarded
Street Address and City (Country) of School				State	ZIP Code
#2 Month/Year To	Month/Year	Code	Name of School	Degree/Diploma/Other	Month/Year Awarded
Street Address and City (Country) of School				State	ZIP Code
#3 Month/Year To	Month/Year	Code	Name of School	Degree/Diploma/Other	Month/Year Awarded
Street Address and City (Country) of School				State	ZIP Code

Enter your Social Security Number before going to the next page →

10 YOUR EMPLOYMENT ACTIVITIES

List your employment activities, beginning with the present (#1) and working back 5 years. You should list all full-time work, part-time work, military service, temporary military duty locations over 90 days, self-employment, other paid work, and all periods of unemployment. The entire 5-year period must be accounted for without breaks, but you need not list employments before your 16th birthday

- **Code.** Use one of the codes listed below to identify the type of employment:
  - 1 - Active military duty stations
  - 2 - National Guard/Reserve
  - 3 - U.S.P.H.S. Commissioned Corps
  - 4 - Other Federal employment
  - 5 - State Government (Non-Federal employment)
  - 6 - Self-employment (Include business name and/or name of person who can verify)
  - 7 - Unemployment (Include name of person who can verify)
  - 8 - Federal Contractor (List Contractor, not Federal agency)
  - 9 - Other
- **Employer/Verifier Name.** List the business name of your employer or the name of the person who can verify your self-employment or unemployment in this block. If military service is being listed, include your duty location or home port here as well as your branch of service. You should provide separate listings to reflect changes in your military duty locations or home ports.
- **Previous Periods of Activity.** Complete these lines if you worked for an employer on more than one occasion at the same location. After entering the most recent period of employment in the initial numbered block, provide previous periods of employment at the same location on the additional lines provided. For example, if you worked at XY Plumbing in Denver, CO, during 3 separate periods of time, you would enter dates and information concerning the most recent period of employment first, and provide dates, position titles, and supervisors for the two previous periods of employment on the lines below that information.

92

#1 Month/Year	Month/Year To Present	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number ( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number ( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number ( )

PREVIOUS PERIODS OF ACTIVITY (Block #1)	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor

#2 Month/Year	Month/Year To	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number ( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number ( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number ( )

PREVIOUS PERIODS OF ACTIVITY (Block #2)	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor

#3 Month/Year	Month/Year To	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number ( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number ( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number ( )

PREVIOUS PERIODS OF ACTIVITY (Block #3)	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor
	Month/Year To	Month/Year	Position Title	Supervisor

Enter your Social Security Number before going to the next page →

YOUR EMPLOYMENT ACTIVITIES *(CONTINUED)*

Month/Year Month/Year To	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#4			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number ( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number ( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number ( )

	Month/Year Month/Year To	Position Title	Supervisor
PREVIOUS PERIODS OF ACTIVITY *(Block #4)*	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor

Month/Year Month/Year To	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#5			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number ( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number ( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number ( )

	Month/Year Month/Year To	Position Title	Supervisor
PREVIOUS PERIODS OF ACTIVITY *(Block #5)*	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor

Month/Year Month/Year To	Code	Employer/Verifier Name/Military Duty Location	Your Position Title/Military Rank
#6			

Employer's/Verifier's Street Address	City (Country)	State	ZIP Code	Telephone Number ( )
Street Address of Job Location (if different than Employer's Address)	City (Country)	State	ZIP Code	Telephone Number ( )
Supervisor's Name & Street Address (if different than Job Location)	City (Country)	State	ZIP Code	Telephone Number ( )

	Month/Year Month/Year To	Position Title	Supervisor
PREVIOUS PERIODS OF ACTIVITY *(Block #6)*	Month/Year Month/Year To	Position Title	Supervisor
	Month/Year Month/Year To	Position Title	Supervisor

11 PEOPLE WHO KNOW YOU WELL

List three people who know you well and live in the United States. They should be good friends, peers, colleagues, college roommates, etc., whose combined association with you covers as well as possible the last 5 years. Do not list your spouse, former spouses, or other relatives, and try not to list anyone who is listed elsewhere on this form.

Name **#1**	Dates Known Month/Year Month/Year To	Telephone Number Day Night ( )	
Home or Work Address	City (Country)	State	ZIP Code

Name **#2**	Dates Known Month/Year Month/Year To	Telephone Number Day Night ( )	
Home or Work Address	City (Country)	State	ZIP Code

Name **#3**	Dates Known Month/Year Month/Year To	Telephone Number Day Night ( )	
Home or Work Address	City (Country)	State	ZIP Code

Enter your Social Security Number before going to the next page →

12 YOUR SELECTIVE SERVICE RECORD

	Yes	No
a Are you a male born after December 31, 1959? If "No," go to 13. If "Yes," go to b.		
b Have you registered with the Selective Service System? If "Yes," provide your registration number. If "No," show the reason for your legal exemption below.		

Registration Number | Legal Exemption Explanation

13 YOUR MILITARY HISTORY

	Yes	No
a Have you served in the United States military?		
b Have you served in the United States Merchant Marine?		

List all of your military service below, including service in Reserve, National Guard, and U.S. Merchant Marine. Start with the most recent period of service (#1) and work backward. If you had a break in service, each separate period should be listed.

Code. Use one of the codes listed below to identify your branch of service:

1 - Air Force 2 - Army 3 - Navy 4 - Marine Corps 5 - Coast Guard 6 - Merchant Marine 7 - National Guard

O/E. Mark "O" block for Officer or "E" block for Enlisted.

Status. "X" the appropriate block for the status of your service during the time that you served. If your service was in the National Guard, do not use an "X"; use the two-letter code for the state to mark the block.

Country. If your service was with other than the U.S. Armed Forces, identify the country for which you served.

Month/Year	Month/Year	Code	Service/Certificate #	O	E	Status: Active	Active Reserve	Inactive Reserve	National Guard (State)	Country
	To									
	To									

14 ILLEGAL DRUGS

	Yes	No
In the last year, have you used, possessed, supplied, or manufactured illegal drugs? When used without a prescription, illegal drugs include marijuana, cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), stimulants (cocaine, amphetamines, etc.), depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.). (NOTE: Neither your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding.)		

If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs. Include any treatment or counseling received.

Month/Year	Month/Year	Type of Substance	Explanation
	To		
	To		
	To		

Continuation Space

Use the continuation sheet(s) (SF86A) for additional answers to items 8, 9, and 10. Use the space below to continue answers to all other items and any information you would like to add. If more space is needed than is provided below, use a blank sheet(s) of paper. Start each sheet with your name and Social Security number. Before each answer, identify the number of the item.

After completing this form you should review your answers to all questions to make sure the form is complete and accurate, and then sign and date the following certification and sign and date the release on Page 6.

Certification That My Answers Are True

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code).

Signature (Sign in ink) | Date

Enter your Social Security Number before going to the next page →

Standard Form 85
Revised September 1995
U.S. Office of Personnel Management
5 CFR Parts 731 and 736

Form approved:
OMB No. 3206-0005
NSN 7540-00-634-4035
85-111

UNITED STATES OF AMERICA

AUTHORIZATION FOR RELEASE OF INFORMATION

Carefully read this authorization to release information about you, then sign and date it in black ink.

96

I Authorize any investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting my background investigation, to obtain any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information. This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information.

I Understand that, for some sources of information, a separate specific release will be needed, and I may be contacted for such a release at a later date.

I Authorize custodians of records and sources of information pertaining to me to release such information upon request of the investigator, special agent, or other duly accredited representative of any Federal agency authorized above regardless of any previous agreement to the contrary.

I Understand that the information released by records custodians and sources of information is for official use by the Federal Government only for the purposes provided in this Standard Form 85, and may be redisclosed by the Government only as authorized by law.

Copies of this authorization that show my signature are as valid as the original release signed by me. This authorization is valid for two (2) years from the date signed.

Signature *(Sign in ink)*	Full Name *(Type or Print Legibly)*		Date Signed
Other Names Used			Social Security Number
Current Address *(Street, City)*	State	ZIP Code	Home Telephone Number *(Include Area Code)*
			( )

INV FORM 42 (Rev. 6/05)
U.S. OFFICE OF PERSONNEL MANAGEMENT (5 CFR 736)

INVESTIGATIVE REQUEST FOR PERSONAL INFORMATION

U.S. GOVERNMENT USE ONLY

FROM

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
FEDERAL INVESTIGATIONS PROCESSING CENTER
PO BOX 618
BOYERS, PA 16018-0618

TO

96

INSTRUCTIONS: Your name has been provided by the person identified below to assist in completing a background investigation to help us determine this person's suitability for employment or security clearance. To help us make this determination, we ask that you complete all items on the back of this form and return the form in the enclosed envelope. You were listed as:

PRIVACY ACT INFORMATION: This investigative inquiry is in full compliance with the Privacy Act of 1974 and other laws protecting the civil rights of the person we are investigating. The information you provide, including your identity, will be disclosed to the person being investigated and other federal agencies, at this person's request.

CERTIFICATION: The person we are investigating has given written consent for this investigative inquiry. We keep that consent on file. If a copy is required in order to complete this form, or you would like to keep your identity confidential, please indicate this requirement in writing on the reverse.

Completion of this investigation as soon as possible will help this person and the agency perform their duties in a more timely and efficient manner.

CASE NUMBER: CASE TYPE: ITEM NUMBER:

FULL NAME (LAST, FIRST, MIDDLE)
OTHER NAMES USED
POSITION FOR WHICH INVESTIGATED
THIS PERSON CLAIMED THE FOLLOWING:

PUBLIC BURDEN INFORMATION We estimate the Public Burden for this collection of information is approximately 5 minutes per response. This includes time for reviewing the instructions, gathering the information requested, and completing and returning the form. You may send comments regarding our estimate or any other aspect of this form, including suggestions for reducing completion time, to the Office of Personnel Management, Forms Officer, Paperwork Reduction Act (3206-0165), Washington, DC 20415-7900. The OMB Number 3206-0165 is currently valid. OPM may not collect this information, and you are not required to respond, unless the number is displayed. Do not send your completed form to this address.

GPO U.S. GOVERNMENT PRINTING OFFICE:2007-330-416/80563 221433-4

FORM APPROVED: OMB:3206-0165

MARKING INSTRUCTIONS

CORRECT MARK: ●

- USE A NO. 2 PENCIL OR BLUE OR BLACK INK PEN ONLY.
- DO NOT USE PENS WITH INK THAT SOAKS THROUGH THE PAPER.
- DO NOT MAKE ANY STRAY MARKS ON THIS SHEET.

INCORRECT MARKS: ✗ ✓ ⊘ ⊖

PLEASE COMPLETE THE ITEMS SHOWN BELOW

1 HOW LONG HAVE YOU KNOWN THIS PERSON?

a ___ YEARS ___ MONTHS b I DON'T KNOW THIS PERSON (DON'T COMPLETE OTHER ITEMS)

2 MY ASSOCIATION WITH THIS PERSON IS/WAS AS A:

a COWORKER c FRIEND e FORMER SPOUSE g RELATIVE
b NEIGHBOR d SPOUSE f INSTRUCTOR h OTHER (PLEASE EXPLAIN IN ITEM 8)

3 ON THE AVERAGE, I ASSOCIATE(D) WITH THIS PERSON:

a DAILY c MONTHLY e ONCE EVERY YEAR OR 2
b WEEKLY d TWICE A YEAR f ONCE IN 3 OR MORE YEARS

4 I LAST ASSOCIATED WITH THIS PERSON:

a 0 TO 3 MONTHS AGO c 1 TO 3 YEARS AGO e MORE THAN 5 YEARS AGO
b 3 TO 12 MONTHS AGO d 3 TO 5 YEARS AGO

5 DOES THE INFORMATION ON THE FRONT OF THIS FORM CONCERNING THIS PERSON APPEAR TO BE CORRECT?

a YES b NO—IT APPEARS TO BE INCORRECT OR INCOMPLETE (SHOW CORRECT OR ADDITIONAL DATA IN ITEM 8)

6 DO YOU HAVE ANY REASON TO QUESTION THIS PERSON'S HONESTY OR TRUSTWORTHINESS?

a NO c I DO NOT KNOW THIS PERSON WELL ENOUGH TO RESPOND
b YES (PLEASE EXPLAIN IN ITEM 8) d I WISH TO DISCUSS THE ADVERSE INFORMATION I HAVE

7 DO YOU HAVE ANY ADVERSE INFORMATION ABOUT THIS PERSON'S EMPLOYMENT, RESIDENCE OR ACTIVITIES CONCERNING:

	YES	NO		YES	NO		YES	NO
a			VIOLATIONS OF THE LAW			c ABUSE OF ALCOHOL AND/OR DRUGS			e GENERAL BEHAVIOR OR CONDUCT
b			FINANCIAL INTEGRITY			d MENTAL OR EMOTIONAL STABILITY			f OTHER MATTERS

(IF YES, PLEASE EXPLAIN IN ITEM 8)

I WISH TO DISCUSS THE ADVERSE INFORMATION I HAVE

8 IF ADDITIONAL INFORMATION IS PROVIDED BELOW, YOU MUST FILL IN THIS MARK.

ADDITIONAL INFORMATION WHICH YOU FEEL MAY HAVE A BEARING ON THIS PERSON'S SUITABILITY FOR GOVERNMENT EMPLOYMENT OR A SECURITY CLEARANCE. THIS SPACE MAY BE USED FOR DEROGATORY AS WELL AS POSITIVE INFORMATION.

9 DO YOU RECOMMEND THIS PERSON FOR GOVERNMENT SECURITY CLEARANCE OR EMPLOYMENT?

a YES c I DON'T KNOW THIS PERSON WELL ENOUGH TO MAKE
b NO (PLEASE EXPLAIN IN ITEM 8) A RECOMMENDATION

PRINT NAME:

PLEASE SIGN THIS FORM HERE: DATE

YOUR TITLE: DAYTIME TELEPHONE NUMBER (INCLUDE AREA CODE)

FOR OPM USE ONLY

RESULTS

AC	ACCEPTABLE	IS	ISSUES
AA	ACCEPTABLE/ATTACHED	FI	CONFIDENTIAL/ISSUES
FA	CONFIDENTIAL/ACCEPTABLE	RI	RECORD INCONCLUSIVE
NI	NO PERTINENT INFORMATION	FR	FEE REQUIRED
NR	NO RECORD	RL	RELEASE REQUIRED
NL	NOT LOCATED	SK	SUBJECT UNKNOWN
UC	UNABLE TO CONTACT	NZ	NOT AVAILABLE
RF	REFERRED	DN	DISCREPANT
RR	RECORD		

ISSUES/CHARACTERIZATION

1	O	A	B	C	D	E	N		9	O	A	B	C	D	E	N			
2	O	A	B	C	D	E	N		10	O	A	B	C	D	E	N			
3	O	A	B	C	D	E	N		11	O	A	B	C	D	E	N			
4	O	A	B	C	D	E	N		12	O	A	B	C	D	E	N			
5	O	A	B	C	D	E	N		13	O	A	B	C	D	E	N			
6	O	A	B	C	D	E	N		14	O	A	B	C	D	E	N			
7	O	A	B	C	D	E	N												
8	O	A	B	C	D	E	N												

97

Issue Characterization Chart

1. Intoxicants

A	B	C	D
Drunk Drunk and disorderly Liquor law violation (use or possession by minor)	Driving and driving Driving under influence Driving while intoxicated	Illegal manufacturing Illegal sale	Pattern of excessive use as reflected as: • convictions • job performance • employment gaps • inability to function responsibly • medical treatment or poor health

2. Drug Use

A	B	C	D
Infrequent use or possession of marijuana Possession of marijuana paraphernalia Arrested or charged with possession of marijuana	Regular use or possession of marijuana Infrequent use or possession of other controlled substances Possession of drug paraphernalia Cultivating marijuana for personal use	Transfer of controlled substances Possession for sale or resale Prescription fraud or forgery Sale of controlled substances Unlawful dispensing of prescription drugs Smuggling contraband drugs into prison Regular use of controlled substances other than marijuana	Pattern of use or excessive use as reflected in 1D above. manufacturing addiction importing trafficking cultivating for sale

3. Financial Responsibility

A	B	C	D
Bad check Infrequent, irregular, but deliberate delinquency in meeting financial obligations	Non-support Judgement, tax lien or other default with no attempt at restitution Illegal gambling Eviction	Pattern of irresponsibility as reflected in... • credit history • disregard for debts • abuse of fiduciary trust	Pattern of irresponsibility in 3C, plus... • continuing, major, valid liabilities

4. Criminal and Immoral Conduct

A	B	C	D
	Indecent exposure Solicitation Voyeurism, peeping tom Mailing, selling, or displaying obscene material Obscene phone call Indecent proposal	Carnal knowledge Sodomy Prostitution Bigamy or polygamy Pimping or pandering Keeping house of ill repute Contributing to delinquency of or corrupting morals of minor Sexual harassment Other sexual misconduct with impact on job	Pattern of misconduct as reflected in conviction records Child molestation Sexual assault Statutory rape Incest Bestiality

5. Honesty

A	B	C	D
Non-material, intentional false statement or deception or fraud in examination or application	Altering Breaking & entering Forgery Fraud Possession of stolen property Black market activities (non-profit)	Bribery Embezzlement Grand larceny Grand theft Mail theft Burglary Robbery (unarmed)	Pattern of dishonesty as reflected in... • disregard for trust • conviction records • abuse of trust, or • employment records Blackmail

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	Petty larceny Minor gambling or petty theft Shoplifting Abuse of property False statement Filing false instrument Failure to file income tax return	Perjury False impersonation (e.g., impersonating a law enforcement officer) Insurance misrepresentation of stolen goods Black market activities (with intent to profit) Income tax evasion Receiving stolen property	Counterfeiting Extortion Armed robbery Material, intentional false statement or deception or fraud in connection or appointment* Deliberate misrepresentation, falsification, or omission of material fact**

* 731.202 (b)(3) applies – Use solely for falsifications in the competitive examination/appointment process
** 731.202 (b)(2) applies – Use for falsifications outside the competitive examining process

6. Disruptive or Violent Behavior

A	B	C	D
Disorderly conduct Disturbing the peace Making a threat Resisting arrest Abusive language Unlawful assembly	Assault Damaging property Destroying property Hit & run Vandalism Criminal or malicious mischief Harassment Cruelty to animals Loitering prosecution Evading police	Assault & battery Battery Manslaughter (involuntary)	Pattern of violence as reflected in... - conviction records - charges for life or property - civil actions - employment records, or - medical records Aggravated assault Assault with deadly weapon Assault with intent to commit rape Kidnapping or abduction Murder Rape Arson Threat or assault upon public official Manslaughter (voluntary) Child abuse

7. Employment Misconduct, Negligence*

A	B	C	D
Attitude Personality Conflict	Insubordination Absenteeism or attendance problem Rules or regulation violation		Pattern of unemployability Based on misconduct or negligence as reflected in employment history

* Other issues (use or possession or marijuana, controlled substances and narcotics, financial responsibility, criminal/immoral conduct, honesty, disruptive or violent behavior, etc.) which lead to termination or forced resignation are rated one level for adjudication purposes. For example, petty theft, a "B" issue by itself, becomes a "C" issue if it is determined to be the reason for termination or forced resignation from employment.

8. Firearms and Weapons

A	B	C	D
Possession of an unregistered firearm	Possession of a prohibited weapon Possession of illegal ammunition Carrying deadly weapon Unlawful Discharge of firearm	Carrying concealed weapon or firearm Brandishing firearm Possession of firearm by felon Possession of loaded firearm Possession of explosives	Improper or illegal sale or transportation of firearms or explosives Illegal manufacture of firearms or explosives

9. Miscellaneous

A	B	C	D
Vagrancy Loitering Trespassing Minor traffic violations (traffic violations not required to be admitted on OF306 or other application material/QIP will not be considered issues)	Traffic violations greater than "A", but less than "C" Contempt of court Driving motor vehicle without owner's consent Possession of instruments of crime	Voluntary manslaughter Refusal to furnish testimony by 5 CFR 5.4 Tampering with a witness Harboring a fugitive	Hatch Act violation Mutilation or destruction of public records Engaging in riots or civil disorders Striking against the Government Desertion

NOTE:

For conduct not listed in this chart, attempt to find a like or related issue, and use the characterization of the listed issue. If realized conduct does not equate with a listed issue, but seems to relate more appropriately to a level where no issues are identified (such as level A for issue 4), identify the issue at the level. Criminal offenses shown as "attempted" or "accessory to" are characterized by the base charge (e.g., Attempted Burglary equals Burglary). Characterize the seriousness of the issue by the conduct in and rather than its outcome (e.g., "assault" may warrant actual characterization as a "D" issue rather than a "B" if the details show serious injury inflicted on the victim, etc). Any uncertainty about an issue should be resolved by an experienced Adjudicator.

The ranking of probation/parole violations is determined by the nature of the issue leading to the violation. For example, a probation/parole violation for driving while intoxicated is adjudicated at level "B" while a violation for assault with a deadly weapon is adjudicated at level "D."

10. Statutory Debarment

The following issues require *AUTOMATIC* debarment from Federal employment for the period specified below. The legal authority for debarment must be consulted prior to taking debarment action.

Issue	Debarment Period	Legal Authority
Illegally receiving, asking, promising or offering compensation for services in matters affecting the Government	Indefinite	18 U.S.C. 203
Current, habitual use of intoxicating beverages to excess	NTE 3 years	5 U.S.C. 7352
Evidence of disloyalty: advocates or is a knowing member of an organization that advocates the overthrow of our constitutional form of government	Indefinite	5 U.S.C. 7311; 18 U.S.C. 1918
Participation in a strike against the Government	Indefinite	5 U.S.C. 7311; 18 U.S.C. 1918
Willful and unlawful concealment, removal, mutilation or destruction (or attempts) of public records and materials	Indefinite	18 U.S.C. 2071.(b)
Inciting, organizing, promoting, encouraging, engaging or aiding others to engage in riots or civil disorders	5 years from the date the conviction becomes final	5 U.S.C. 7313
Interference by an officer or member of the armed forces with elections	Indefinite	5 U.S.C. 593
Unlawful approval of bond or surety by a postmaster	Indefinite (from employment as postmaster only)	18 U.S.C. 1733
Theft or unlawful concealment of money or other property of value from a bank or safe in, or adjacent to, a bank which is a Federal Reserve member or is insured by the Federal Deposit Insurance Corporation (FDIC)	Indefinite (from positions of national bank examiner only)	18 U.S.C. 655

Unlawful trading in public property by collectors or disbursing officer	Indefinite	18 U.S.C. 1901
Unauthorized disclosure of information by a farm credit examiner	Indefinite (from employment as a farm credit examiner only)	18 U.S.C. 1907
Unauthorized disclosure of information by a National Agricultural Credit Corporation (NACC) examiner	Indefinite (from employment as an NACC examiner only)	18 U.S.C. 1908
Committing treason against the United States	Indefinite	18 U.S.C. 2381
Inciting, assisting or participating in any rebellion or insurrection against the United States	Indefinite	18 U.S.C. 2383
Knowingly and willfully advocating, abetting, advising or teaching the overthrow of the United States Government or any political subdivision of the United States	5 years from the date of the conviction	18 U.S.C. 2385
Activities intended to impair the loyalty, morale and discipline of the United States Armed Forces	5 years from the date of the conviction	18 U.S.C. 2387
Conviction for misdemeanor crime (under Federal or State law) of domestic violence (use or attempted use of physical force, or the threatened use of a deadly weapon, committed by current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting or who has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim)	Indefinite from any positions requiring the individual to ship, transport, possess, or receive firearms or ammunition	PL 104-208 Omnibus Consolidated Appropriations Act of 1997 (amended the Gun Control Act of 1968)
Any individual who has been found guilty of, or has entered a plea of nolo contendere or guilty to any offense under Federal, State, or tribal law involving crimes of violence, sexual assault, molestation, exploitation, contact or prostitution; or crimes against persons.	Indefinite from any position involving regular contact with, or control over, Indian children	PL 101-630, Indian Child Protection and Family Violence Act, dated November 28, 1990, contains minimum standards. Refer also to Department of Interior or Health and Human Services agency regulations, as appropriate.
Knowing and willful failure to register under Section 3 of the Military Selective Service Act (50 U.S.C. App. 453)	Indefinite (only from positions in executive agencies)	5 U.S.C. 3328

* Applies to men born after December 31, 1959, who are or were required to register and who are not registered, or did not register before the requirement terminated or became inapplicable to the individual. Processing guidance can be found at 5 CFR 300.

11. Loyalty and Security

- Any *SUITABILITY* issue indicating evidence of disloyalty or terrorism that does *NOT* require statutory debarment will be adjudicated at level D.
- Homosexuality, in and of itself, while not a suitability issue, may be a security issue and must be addressed completely, when indications are present of possible susceptibility to coercion or blackmail.
- Cohabitation, adultery, illegitimate children, etc. are rarely suitability issues but, in certain circumstances, may be security issues.
- Previous instances of security violations, clearance denials or revocations are included.
- Any other issue not listed elsewhere may be a suitability issue considered in security adjudication. (Examples are judgment, reliability, and dependability issues)

12. Qualifications (including health)

- Lack of required knowledge, skills, and abilities
- Inability to perform or poor performance which is not due to negligence or misconduct
- Physical health issues; and
- Mental, emotional, psychological, or psychiatric issues which do not include other issues listed in this Appendix.

13. Issues Relating to Associates

- Issues listed in this chart that relate to an associate of the person under investigation.

14. Issues Relating to Relatives

- Issues listed in this chart that relate to a relative of the person under investigation.
- Use issue codes 13 or 14 only when the issue has a bearing on the suitability or security determination of the person under investigation.

Bribery of public officials and witnesses, and graft in connection with public service matters may also serve as a basis for debarment. Some misconduct requires removal from Federal employment, but no automatic debarment. (*See 5 CFR 735*)

- **SUITABILITY UPGRADE** – considers that multiple issues raise more serious questions about suitability

FREQUENCY	UPGRADE ACTION
2 ISSUES IN 0-36 MONTHS	RAISE BOTH ISSUES ONCE (e.g., "A" to "B")
3 OR MORE ISSUES IN 0-36 MONTHS	RAISE ALL ISSUES TWICE (e.g., "A" to "C")

- **DOWNGRADE (CONVERSION) OF ISSUES** - considers issues over 36 months old to be less serious

ISSUE		PERIOD IN WHICH ISSUE OCCURRED		
		0-36 MO	*37-72 MO*	*73-108 MO*
B	CONVERTS TO	B	A	NON-ISSUE
C		C	B	A
D		D	C	B

Note: Any issues over 108 months are considered to be non-issues.

- **DEBARMENT ACTION** (only OPM may impose the maximum 3 year period of debarment. Agencies may impose up to one year and may use the chart to determine if referral to OPM for a longer bar is warranted)

ISSUE	RECENCY		
	0-12 MO	*13-24 MO*	*25-36 MO*
C	24 MO DEBAR	18 MO DEBAR	12 MO DEBAR*
D	36 MO DEBAR	24 MO DEBAR	18 MO DEBAR*

* OPM would rarely take action on a case in which less than a 24 month bar remains. Debarment action will only be taken on C issue cases when careful assessment of the job-relatedness of the specific issue(s) involved warrants such action. The disqualifying nature of the conduct in D issue cases usually warrants debarment action.

The debarment period begins on the date of the final decision letter or 120 days after the control date, whichever is closer to the control date. IN REMOVAL DECISION,

CONSIDER IMPOSING MAXIMUM DEBARMENT RATHER THAN RELYING ON THE DEBARMENT PERIODS STATED IN THE CHART.

- DETERMINING RECENCY OF ISSUES(S) – The following control dates by type of case are used in determining the recency of issue(s) for issue conversion or upgrade purposes:

TYPE OF CASE	CONTROL DATE
Civil Service Register or Outside Register Applicant Filing Directly with Agency	Date document (i.e., OF 306, etc.) containing conduct information was first considered by Personnel Office. (If referred to OPM-FIPC-SAS, use the date of referral or objection/passover)
Investigated Applicant	Date subject signed investigative data form.
Appointee or Employee	Date subject signed investigative data form. (However, if falsification/fraud of a material fact is discovered, use date conduct first identified as an issue. In addition, when determining debarment length at the final decision stage, consider imposing the maximum debarment rather than relying on the debarment periods calculated with the control date.)

When new actionable issues arise subsequent to the original control date, the control date becomes the date of occurrence of the most recent actionable conduct.

The control date for cases involving an applicant whose previous application was canceled because of pending charges is the date of referral of the current or most recent application. If two or more applications are received for suitability determination, the control date for the case is the earliest referral date.

[Seal Omitted]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

M-05-24
Aug. 5, 2005

MEMORANDUM FOR THE HEADS OF ALL DEPARTMENTS AND AGENCIES

FROM: Joshua B. Bolten
Director

SUBJECT: Implementation of Homeland Security Presidential Directive (HSPD) 12—Policy for a Common Identification Standard for Federal Employees and Contractors

On August 27, 2004, the President signed HSPD-12 "Policy for a Common Identification Standard for Federal Employees and Contractors" (the Directive). The Directive requires the development and agency implementation of a mandatory, government-wide standard for secure and reliable forms of identification for Federal employees and contractors. As required by the Directive, the Department of Commerce issued Federal Information Processing Standard 201 (the Standard). This memorandum provides implementing instructions for the Directive and the Standard.

Inconsistent agency approaches to facility security and computer security are inefficient and costly, and increase risks to the Federal government. Successful implementation of the Directive and the Standard will increase the security of your Federal facilities and infor-

mation systems. As noted in the attached guidance, this standard identification applies to your employees and contractors who work at your facilities or have access to your information systems. Following implementation, Federal departments and agencies will be able to recognize and accept this common identification standard.

It is important to note the use of standard identification does not replace your existing law or OMB policy responsibilities; including the laws and policies governing personnel security, acquisition, and information technology security law.

If you have questions about this guidance, contact Jeanette Thornton, Policy Analyst, Information Policy and Technology Branch, Office of Management and Budget. Phone (202) 395-3562, fax (202) 395-5167, or e-mail: *eauth@omb.eop.gov*.

Attachments

A) HSPD-12 Implementation Guidance for Federal Departments and Agencies

B) HSPD-12 Policy for a Common Identification Standard for Federal Employees and Contractors

Attachment A

HSPD-12 IMPLEMENTATION GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES

* * * * *

1. To whom does the Directive apply?

As defined below, Department and Agency heads must conduct a background investigation, adjudicate the results, and issue identity credentials to their employees and contractors who require long-term access to Federally controlled facilities and/or information systems.

A. Departments and Agencies

- "Executive departments" and agencies listed in title 5 U.S.C. § 101, and the Department of Homeland Security; "independent establishments" as defined by title 5 U.S.C. §104(1); and the United States Postal Service (title 39 U.S.C § 201).

Does **not** apply to:

- "Government corporations" as defined by title 5 U.S.C. § 103(1) are encouraged, but not required to implement this Directive.

B. Employee

- Federal employees, as defined in title 5 U.S.C § 2105 "Employee," within a department or agency.
- Individuals employed by, detailed to or assigned to a department or an agency.

- Within the Department of Defense (DoD) and the Department of State (DoS), members of the Armed Forces, Foreign Service, and DoD and DoS civilian employees (including both appropriated fund and non-appropriated fund employees).
- Applicability to other agency specific categories of individuals (e.g., short-term (i.e. less than 6 months) guest researchers; volunteers; or intermittent, temporary or seasonal employees) is an agency risk-based decision.

Does **not** apply to:

- Within DoD and DoS, family members and other eligible beneficiaries.
- Occasional visitors to Federal facilities to whom you would issue temporary identification.

C. **Contractor**

- Individual under contract to a department or agency, requiring routine access to federally controlled facilities and/or federally controlled information systems to whom you would issue Federal agency identity credentials, consistent with your existing security policies.

Does **not** apply to:

- Individuals under contract to a department or agency, requiring only intermittent access to federally controlled facilities.

D. Federally Controlled Facilities

- Federally-owned buildings or leased space, whether for single or multi-tenant occupancy, and its grounds and approaches, all or any portion of which is under the jurisdiction, custody or control of a department or agency covered by this Directive.
- Federally controlled commercial space shared with non-government tenants. For example, if a department or agency leased the 10th floor of a commercial building, the Directive applies to the 10th floor only.
- Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities.
- Facilities under a management and operating contract. Such as for the operation, maintenance, or support of a Government-owned or-controlled research, development, special production, or testing establishment.

E. Federally Controlled Information Systems

- Information technology system (or information system), as defined by the Federal Information Security Management Act of 2002 (44 U.S.C. § 3502(8)).
- Information systems used or operated by an agency or by a contractor of an agency or other organization on behalf of an agency (44 U.S.C. § 3544(a)(1)(A)).

- Applicability for access to Federal systems from a non-Federally controlled facility (e.g. a researcher up-loading data through a secure website or a contractor accessing a government system from their own facility) should be based on the risk determination required by existing National Institute of Standards and Technology (NIST) guidance.[1]

Does **not** apply to:

- Identification associated with national security systems as defined by the Federal Information Security Management Act of 2002 (44 U.S.C. § 3542(2)(A)).[2]

2. What is the schedule for implementing the Directive?

A. The Department of Commerce's National Institute of Standards and Technology (NIST) shall meet the following milestones:

Date	Department of Commerce Action
2/25/05	HSPD-12 Standard Published—Federal Information Processing Standard 201 (FIPS 201)[3]

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[1] Federal Information Processing Standard (FIPS 199): Standards for Security Categorization for Federal Information and Information Systems, 2/04, http://www.csrc.nist.gov/publications/fips/fips199/FIPS-PUB-199-final.pdf.

[2] See NIST Special Publication 800-59: Guideline for Identifying an Information System as a National Security System, 8/03, http://www.csrc.nist.gov/publications/nistpubs/800-59/SP800-59.pdf.

[3] FIPS 201: Personal Identity Verification for Federal Employees and Contractors, 2/25/05, http://www.csrc.nist.gov/publications/fips/

6/25/05	Technical reference implementation released
8/5/05	Conformance testing information released

fips201/FIPS-201-022505.pdf. All technical documents are available at http://www.csrc.nist.gov/piv-project/.

B. All covered departments and agencies shall complete the following actions:

Date	Agency Action
6/27/05	Implementation plans submitted to OMB
8/26/05	Provide list of other potential uses of Standard (see question 7)
10/27/05	Comply with FIPS 201, Part 1 (see question 3)
10/27/06	Begin compliance with FIPS 201, Part 2 (see question 4)
10/27/07	Verify and/or complete background investigations for all current employees and contractors (see question 3)
10/27/08	Complete background investigations for all Federal department or agency employees employed over 15 years (see question 3)

C. The General Service Administration (GSA) shall complete the following actions:

Date	General Services Administration Action
7/31/05	Establish authentication acquisition services (see question 5)
10/27/05	Sponsor Federal Acquisition Regulation (FAR) amendment implementing the Standard

3. How should I implement Part 1 of the Standard?

The Standard, required by HSPD-12, contains two parts to guide department and agency implementation. The requirements of part 2 build upon the requirements of part 1. They are:

- **Part 1: Common Identification, Security and Privacy Requirements**—minimum requirements for a Federal personal identification system that meets the control and security objectives of the Directive, including the personal identity proofing, registration, and issuance process for employees and contractors.
- **Part 2: Government-wide Uniformity and Interoperability**—Detailed specifications to support technical interoperability among departments and agencies, including card elements, system interfaces, and security controls required to securely store and retrieve data from the card.

For all new employees, contractors and other applicable individuals your department or agency must by October 27, 2005:

A. **Adopt and accredit a registration process** consistent with the identity proofing, registration and accreditation requirements in section 2.2 of the Standard and forthcoming technical guidance issued by NIST, regardless of whether your agency will be ready to issue standard compliant identity credentials by October 27, 2005. This registration process will apply to all new identity credentials issued (i.e. no new identity credentials can be issued until these conditions are met).[4]

B. **Initiate the National Agency Check with Written Inquiries (NACI) or other suitability or national security investigation prior to credential issuance.** Before issuing the credential, agencies should receive notification of results of the National Agency Checks.[5] If you do not receive the results in 5 days, the identity credential can be issued based on the FBI National Criminal History Check (fingerprint check).[6]

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[4] NIST Special Publication 800-79: Guidelines for the Certification and Accreditation of PIV Card Issuing Organizations, 7/05, http://www.csrc.nist.gov/piv-project/publications/sp800-79.pdf.

[5] The National Agency Checks are the Security/Suitability Investigations Index (SII), Defense Clearance and Investigation Index (DCII), FBI Name Check, and FBI National Criminal History Fingerprint Check. The National Agency Check with Written Inquiries includes all of the National Agency Checks plus searches of records covering specific areas of an individual's background during the past five years.

[6] Section 2.2 of the Standard has been revised to clarify for the initial credential issuance, only the fingerprint check must be completed.

Identity credentials issued to individuals without a completed NACI or equivalent must be electronically distinguishable (i.e. information is stored in the data on the card) from identity credentials issued to individuals who have a completed investigation. The Department of Commerce will provide the electronic format for this information.

Agencies shall not re-adjudicate individuals transferring from another department or agency provided: 1) possession of a valid Federal identity credential can be verified by the individual's former department or agency, and 2) the individual has undergone the required NACI or other suitability or national security investigation at individual's former agency.

Since Foreign National employees and contractors may not have lived in the United States long enough for a NACI to be meaningful, agencies should conduct an equivalent investigation, consistent with your existing policy. OMB will establish an interagency working group to explore whether guidance is necessary with respect to background investigations for foreign national employees and contractors.

C. **Include language implementing the Standard in applicable new contracts.** All new contracts (including exercised options) requiring contractors (as defined in 1.C. above) to have long term access to federally controlled facilities or access to federally controlled information systems shall include a requirement to comply with the Directive and Standard for affected contractor person-

nel. Agencies must comply with the forthcoming Federal Acquisition Regulation sections on these requirements.

For current employees, contractors and other applicable individuals, your department or agency must by October 27, 2005:

D. **For current employees,** develop a plan and begin the required background investigations for all current employees who do not have an initiated or successfully adjudicated investigation (i.e., "completed National Agency Check with Written Inquires or other Office of Personnel Management [OPM] or National Security community investigation") on record. By October 27, 2007 verify and/or complete background investigations for all current employees.

At card renewal (every 5 years), the NACI requirements should be followed in accordance with OPM guidance. Currently OPM does not have a requirement to reinvestigate employees, not otherwise subject to an investigation (e.g. for a security clearance).

For individuals who have been Federal department or agency employees over 15 years, a new investigation may be delayed, commensurate with risk, but must be completed no later than October 27, 2008.

E. **For current contractors and other applicable individuals,** develop a plan and begin the required background investigations for all current contractors who do not have a successfully adjudicated investigation on record. Phase in this require-

ment to coincide with the contract renewal cycle, but no later than October 27, 2007.

4. How should I implement Part 2 of the Standard?

By October 27, 2006, all departments and agencies must begin deploying products and operational systems meeting these requirements:

A. **Issue and require the use of identity credentials for all new employees and contractors,** compliant with Parts 1 and Part 2 of the Standard. For current employees and contractors, phase in issuance and use of identity credentials meeting the Standard to end no later than October 27, 2007.

B. **Implement the technical** requirements of the Standard in the areas of personal authentication, access controls and card management, consistent with the Standard (i.e. sections 3, 4, and 5) and NIST Special Publication 800-73.[7]

C. **Risk Based Facility Access**—Use the appropriate card authentication mechanism described in section 6 of the Standard, with minimal reliance on visual authentication to the maximum extent practicable (section 6.2.1). Officials who control access shall determine the appropriate mechanism based on risk determinations.

D. **Use of Digital Certificates**—Compliance with the Standard requires the activation of at least one digital certificate on the identity credential for access control. This digital certificate (and any

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[7] NIST Special Publication 800-73: Integrated Circuit Card for Personal Identity Verification, 4/8/05, http://www.csrc.nist.gov/publications/nistpubs/800-73/SP800-73-Final.pdf.

optional digital certificates on the identity credential) must originate from:

1) An agency certification authority cross-certified with the Federal Bridge Certification Authority at medium assurance or higher by December 31, 2005; or

2) An approved Shared Service Provider.[8]

Agencies must require the use of the identity credential for system access. Prioritize this requirement based on risk, using your authentication risk assessments required by previous OMB guidance and the categorization required by FIPS 199.[9] Document the results and make available to your Chief Information Officer, security office and Inspector General's Office upon request.

You are already required to have rules of behavior in place (including the consequences for violation) before employees and contractors are granted access to systems.[10] All employees and contractors must have access to this documentation.

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[8] OMB Memorandum M-05-05: Electronic Signatures: How to Mitigate the Risk of Commercial Managed Services, 12/20/04, http://www.whitehouse.gov/omb/memoranda/fy2005/m05-05.pdf.

[9] OMB Memorandum M-04-04: E-Authentication Guidance for Federal Agencies, 12/16/03, http://www.whitehouse.gov/omb/memoranda/fy04/m04-04.pdf and FIPS 199: Standards for Security Categorization for Federal Information and Information Systems, 2/04, http://www.csrc.nist.gov/publications/fips/fips199/FIPS-PUB-199-final.pdf.

[10] See OMB Circular A-130 at http://www.whitehouse.gov/omb/circulars/a130/a130trans4.pdf.

5. **What acquisition services are available?**

   A. **Requirement to use federally approved products and services**—To ensure government-wide interoperability, all departments and agencies must acquire products and services that are approved to be compliant with the Standard and included on the approved products list. A forthcoming Federal Acquisition Regulation will require the use of only approved products and services.

   B. **Use of GSA Acquisition Services**—GSA has been designated as the "executive agent for Government-wide acquisitions of information technology" under section 5112(e) of the Clinger-Cohen Act of 1996 (40 U.S.C. § 11302(e)) for the products and services required by the Directive. GSA will report to OMB annually on the activities undertaken as an executive agent.

   GSA will make approved products and services available through blanket purchase agreements (BPA) under Federal Supply Schedule 70 for Information Technology, a schedule under the Multiple Award Schedules (MAS) Program. When developing BPAs, GSA will ensure all approved suppliers provide products and services that meet all applicable federal standards and requirements.

   Departments and agencies are encouraged to use the acquisition services provided by GSA. Any agency making procurements outside of GSA vehicles for approved products must certify the products and services procured meet all applicable federal standards and requirements, ensure

interoperability and conformance to applicable federal standards for the lifecycle of the components, and maintain a written plan for ensuring ongoing conformance to applicable federal standards for the lifecycle of the components.

C. **Sponsorship**—For small departments and agencies and agencies who share facilities with another agency it may not be cost effective to procure your own products or services. GSA will identify agency sponsors who will provide a range of services to agencies. The extent and cost of services to be provided will be determined by agreement between the sponsor and the customer agency.

6. How must I consider privacy in implementing the Directive?

You are already required under the Privacy Act of 1974 (5 U.S.C. § 552a), the E-Government Act of 2002 (44 U.S.C. ch. 36), existing OMB policy and section 2.4 of the Standard to satisfy privacy and security requirements. Implementing the Directive does not alter these requirements. In addition, **prior to identification issuance you must:**

A. Ensure personal information collected for employee and contractor identification purposes is handled consistent with the Privacy Act of 1974 (5 U.S.C. § 552a).

B. Assign an individual to be responsible for overseeing the privacy-related matters associated with implementing this Directive.

C. Submit to OMB, and make publicly available, a comprehensive privacy impact assessment (PIA)

of your HSPD-12 program, including analysis of the information technology systems used to implement the Directive. The PIA must comply with section 208 of the E-Government Act of 2002 (44 U.S.C. ch. 36) and OMB Memorandum M-03-22 of September 26, 2003, "OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002." You must periodically review and update the privacy impact assessment. Email your completed PIA to pia@omb.eop.gov.

D. Update the pertinent employee and contractor identification systems of records notices (SORNs) to reflect any changes in the disclosure of information to other Federal agencies (i.e. routine uses), consistent with Privacy Act of 1974 (5 U.S.C. § 552a) and OMB Circular A-130, Appendix 1.[11] These SORNs should be periodically re-reviewed to ensure accuracy.

E. Collect information using only forms approved by OMB under the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. ch. 35), where applicable. Departments and agencies are encouraged to use Standard Form 85, Office of Personnel Management Questionnaire for Non-Sensitive Positions (OMB No. 3206-0005) or the Standard Form 85P, Office of Personnel Management Questionnaire for Positions of Public Trust (OMB No. 3206-0005) when collecting information. If you plan to collect information from individuals covered by

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[11] See http://www.whitehouse.gov/omb/circulars/a130/a130trans4.pdf.

the PRA using a new form you must obtain OMB approval of the collection under the PRA process.

F. Develop, implement and post in multiple locations (e.g., agency intranet site, human resource offices, regional offices, provide at contractor orientation, etc.) your department's or agency's identification privacy act statement/notice, complaint procedures, appeals procedures for those denied identification or whose identification credentials are revoked, and sanctions for employees violating agency privacy policies.

G. Adhere to control objectives in section 2.1 of the Standard. Your department or agency may have a wide variety of uses of the credential not intended or anticipated by the Directive. These uses must be appropriately described and justified in your SORN(s) and PIA.

Note: OMB has established a small working group to develop model language for common portions of the SORN, PIAs and Privacy Act Statements for department and agency use when implementing the Directive. These products will be completed no later than October 27, 2005.

7. **Is there anything else I must consider or know?**

   A. **Paragraph 5 of the Directive** asks departments or agencies to "identify those Federally controlled facilities, Federally controlled information systems, and other Federal applications that are **important for security** and for which use of the Standard in circumstances not covered by this Directive should be considered" by August 26, 2005. This determination should be consistent with the privacy requirements specified in question 6 of this guidance and should include any uses of the Standard not meeting the control objectives listed in the Standard. If you have identified other facilities, information systems or applications, submit them to the Assistant to the President for Homeland Security, with an electronic copy to the Office of Management and Budget at eauth@omb.eop.gov.

   B. **Annual Reporting**—The applicability section of the Standard requires annual reporting on the numbers of agency issued credentials, to include the respective numbers of agency-issued 1) general credentials and 2) special-risk credentials (issued under the Special-Risk Security Provision on page v of the Standard). Future OMB guidance will address this requirement.

   C. **Biometric Implementation**—This OMB guidance is being issued before finalization of NIST Special Publication 800-76: Biometric Data Specifications for Personal Identity Verification. Agencies may defer the capture of biometrics for the identity credential until the NIST guidance is final.

D. **Employees Serving Undercover**—Agencies with employees who serve undercover shall implement this Directive in a manner consistent with maintenance of the cover, and to the extent consistent with applicable law and policy.

E. **Relationship to Personnel Security Clearances**—The directive reaffirms the existing requirement, first enumerated in Executive Order 10450 of April 27, 1953 to conduct background investigations on all Federal employees. This investigation is used to determine suitability. Thus, the investigation required by the directive is not the same as the investigations required for personnel security clearances or for public trust determinations. The issuance of a security clearance is a discrete privilege and should be done in accordance with applicable standards. Personnel security investigations for the purpose of issuing security clearances or for the purpose of making public trust determinations can be sufficient for the required background investigations required by the directive.

F. **Applying Guidance to Temporary Employees and Contractors**—The requirements for temporary employees and contractors should be viewed as the minimum requirements, dependent on risk and other factors. Agencies who employ temporary personnel (e.g. contract employment under special arrangements with schools, businesses, state and local governments, etc.) should apply this guidance as follows:

- **Employed greater than 6 months**—Apply all sections of this guidance, including the back-

ground investigation requirements in the Standard (e.g. "completed National Agency Check with Written Inquires [NACI] or other Office of Personnel Management or National Security community investigation").

- **Employed 6 months or less**

  a) Apply adequate controls to systems and facilities (i.e. ensuring temporary staff has limited/controlled access to facilities and information systems).

  b) Provide temporary employees and contractors with clear documentation on the rules of behavior and consequences for violation before granting access to facilities and/or systems.

  c) Document any security violations involving these employees, and report them to the appropriate authority within 24 hours.

  d) Identity credentials issued to these individuals must be visually and electronically distinguishable from identity credentials issued to individuals to whom the Standard does apply. Agencies should be careful not to develop policies which overlap or contradict the Standard's processes for identity proofing and issuance.

- **Occasional visitors**

  a) Apply adequate controls to systems and facilities (i.e. ensuring visitors have lim-

ited/controlled access to facilities and information systems).

b) Develop agency-specific visitor policies (as appropriate).

Attachment B

HOMELAND SECURITY PRESIDENTIAL DIRECTIVE/HSPD-12

August 27, 2004

Subject: Policy for a Common Identification Standard for Federal Employees and Contractors

(1) Wide variations in the quality and security of forms of identification used to gain access to secure Federal and other facilities where there is potential for terrorist attacks need to be eliminated. Therefore, it is the policy of the United States to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy by establishing a mandatory, Government-wide standard for secure and reliable forms of identification issued by the Federal Government to its employees and contractors (including contractor employees).

(2) To implement the policy set forth in paragraph (1), the Secretary of Commerce shall promulgate in accordance with applicable law a Federal standard for secure and reliable forms of identification (the "Standard") not later than 6 months after the date of this directive in consultation with the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of the Office of Management and Budget (OMB), and the Director of the Office of Science and Technology Policy. The Secretary of Commerce shall periodically review the Standard and update the Standard as appropriate in consultation with the affected agencies.

(3) "Secure and reliable forms of identification" for purposes of this directive means identification that (a) is issued based on sound criteria for verifying an individual employee's identity; (b) is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation; (c) can be rapidly authenticated electronically; and (d) is issued only by providers whose reliability has been established by an official accreditation process. The Standard will include graduated criteria, from least secure to most secure, to ensure flexibility in selecting the appropriate level of security for each application. The Standard shall not apply to identification associated with national security systems as defined by 44 U.S.C. 3542(b)(2).

(4) Not later than 4 months following promulgation of the Standard, the heads of executive departments and agencies shall have a program in place to ensure that identification issued by their departments and agencies to Federal employees and contractors meets the Standard. As promptly as possible, but in no case later than 8 months after the date of promulgation of the Standard, the heads of executive departments and agencies shall, to the maximum extent practicable, require the use of identification by Federal employees and contractors that meets the Standard in gaining physical access to Federally controlled facilities and logical access to Federally controlled information systems. Departments and agencies shall implement this directive in a manner consistent with ongoing Government-wide activities, policies and guidance issued by OMB, which shall ensure compliance.

(5) Not later than 6 months following promulgation of the Standard, the heads of executive departments and

agencies shall identify to the Assistant to the President for Homeland Security and the Director of OMB those Federally controlled facilities, Federally controlled information systems, and other Federal applications that are important for security and for which use of the Standard in circumstances not covered by this directive should be considered. Not later than 7 months following the promulgation of the Standard, the Assistant to the President for Homeland Security and the Director of OMB shall make recommendations to the President concerning possible use of the Standard for such additional Federal applications.

(6) This directive shall be implemented in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a) and other statutes protecting the rights of Americans.

(7) Nothing in this directive alters, or impedes the ability to carry out, the authorities of the Federal departments and agencies to perform their responsibilities under law and consistent with applicable legal authorities and presidential guidance. This directive is intended only to improve the internal management of the executive branch of the Federal Government, and it is not intended to, and does not, create any right or benefit enforceable at law or in equity by any party against the United States, its departments, agencies, entities, officers, employees or agents, or any other person.

(8) The Assistant to the President for Homeland Security shall report to me not later than 7 months after the promulgation of the Standard on progress made to implement this directive, and shall thereafter report to me

on such progress or any recommended changes from time to time as appropriate.

GEORGE W. BUSH

FIPS PUB 201-1

Change Notice 1

FEDERAL INFORMATION PROCESSING STANDARDS PUBLICATION

Personal Identity Verification (PIV)

of

Federal Employees and Contractors

* * * * *

March 2006

Department of Commerce

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ABSTRACT

This standard specifies the architecture and technical requirements for a common identification standard for Federal employees and contractors. The overall goal is to achieve appropriate security assurance for multiple applications by efficiently verifying the claimed identity of individuals seeking physical access to Federally controlled government facilities and electronic access to government information systems.

The standard contains two major sections. Part one describes the minimum requirements for a Federal personal identity verification system that meets the control and security objectives of Homeland Security Presidential Directive 12, including personal identity proofing, registration, and issuance. Part two provides detailed specifications that will support technical interoperability among PIV systems of Federal departments and agen-

cies. It describes the card elements, system interfaces, and security controls required to securely store, process, and retrieve identity credentials from the card. The physical card characteristics, storage media, and data elements that make up identity credentials are specified in this standard. The interfaces and card architecture for storing and retrieving identity credentials from a smart card are specified in Special Publication 800-73, Interfaces for Personal Identity Verification. Similarly, the interfaces and data formats of biometric information are specified in Special Publication 800-76, Biometric Data Specification for Personal Identity Verification.

This standard does not specify access control policies or requirements for Federal departments and agencies.

* * * * *

Federal Information Processing Standards Publications (FIPS PUBS) are issued by the National Institute of Standards and Technology (NIST) after approval by the Secretary of Commerce pursuant to the Federal Information Security Management Act (FISMA) of 2002.

1. Name of Standard.

FIPS PUB 201: Personal Identity Verification (PIV) of Federal Employees and Contractors.

2. Category of Standard.

Information Security.

3. Explanation.

Homeland Security Presidential Directive 12 (HSPD 12), dated August 27, 2004, entitled "Policy for a Com-

mon Identification Standard for Federal Employees and Contractors," directed the promulgation of a Federal standard for secure and reliable forms of identification for Federal employees and contractors. It further specified secure and reliable identification that—

+ Is issued based on sound criteria for verifying an individual employee's identity
+ Is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation
+ Can be rapidly authenticated electronically
+ Is issued only by providers whose reliability has been established by an official accreditation process.

The directive stipulated that the standard include graduated criteria, from least secure to most secure, to ensure flexibility in selecting the appropriate level of security for each application. As promptly as possible, but in no case later than eight months after the date of promulgation, executive departments and agencies are required to implement the standard for identification issued to Federal employees and contractors in gaining physical access to controlled facilities and logical access to controlled information systems.

4. Approving Authority.

Secretary of Commerce.

5. Maintenance Agency.

Department of Commerce, NIST, Information Technology Laboratory (ITL).

6. Applicability.

This standard is applicable to identification issued by Federal departments and agencies to Federal employees and contractors (including contractor employees) for gaining physical access to Federally controlled facilities and logical access to Federally controlled information systems except for "national security systems" as defined by 44 U.S.C. 3542(b)(2). Except as provided in HSPD 12, nothing in this standard alters the ability of government entities to use the standard for additional applications.

Special-Risk Security Provision—The U.S. Government has personnel, facilities, and other assets deployed and operating worldwide under a vast range of threats (e.g., terrorist, technical, intelligence), particularly heightened overseas. For those agencies with particularly sensitive OCONUS threats, the issuance, holding, and/or use of PIV credentials with full technical capabilities as described herein may result in unacceptably high risk. In such cases of extant risk (e.g., to facilities, individuals, operations, the national interest, or the national security), by the presence and/or use of full-capability PIV credentials, the head of a Department or independent agency may issue a select number of maximum security credentials that do not contain (or otherwise do not fully support) the wireless and/or biometric capabilities otherwise required/referenced herein. To the greatest extent practicable, heads of Departments and independent agencies should minimize the issuance of such special-risk security credentials so as to support inter-agency interoperability and the President's policy. Use of other risk-mitigating technical (e.g., high-assurance on-off switches for the wireless capability) and procedural

mechanisms in such situations is preferable, and as such is also explicitly permitted and encouraged. As protective security technology advances, this need for this provision will be re-assessed as the standard undergoes the normal review and update process.

7. Specifications.

Federal Information Processing Standards (FIPS) 201 Personal Identity Verification (PIV) of Federal Employees and Contractors.

8. Implementations.

The PIV standard consists of two parts—PIV-I and PIV-II. PIV-I satisfies the control objectives and meets the security requirements of HSPD 12, while PIV-II meets the technical interoperability requirements of HSPD 12. PIV-II specifies implementation and use of identity credentials on integrated circuit cards for use in a Federal personal identity verification system.

PIV Cards must be personalized with identity information for the individual to whom the card is issued, in order to perform identity verification both by humans and automated systems. Humans can use the physical card for visual comparisons, whereas automated systems can use the electronically stored data on the card to conduct automated identity verification.

Federal departments and agencies may self-accredit, or use other accredited issuers, to issue identity credentials for Federal employees and contractors until a government-wide PIV-II accreditation process is established. The standard also covers security and interoperability requirements for PIV Cards. Funding permitting, NIST plans to develop a PIV Validation Program

that will test implementations for conformance with this standard. Additional information on this program will be published at http://csrc.nist.gov/npivp/ as it becomes available.

The respective numbers of agency-issued 1) general credentials and 2) Special-risk credentials (issued under the Special-Risk Security Provision) shall be subject to annual reporting to the Office of Management and Budget (OMB) under the annual reporting process in a manner prescribed by OMB.

9. Effective Date.

This standard is effective immediately. Federal departments and agencies shall meet the requirements of PIV-I no later than October 27, 2005, in accordance with the timetable specified in HSPD 12. The OMB has advised NIST that it plans to issue guidance regarding the transition from PIV-I to PIV-II. It is anticipated that some Federal departments and agencies may begin with PIV-II, which would eliminate the need for such a transition.

* * * * *

11. Waivers.

As per the Federal Information Security Management Act of 2002, waivers to Federal Information Processing Standards are not allowed.

12. Where to Obtain Copies.

This publication is available through the Internet by accessing http://csrc.nist.gov/publications/.

* * * * *

1. Introduction

Authentication of an individual's identity is a fundamental component of physical and logical access control processes. When an individual attempts to access security-sensitive buildings, computer systems, or data, an access control decision must be made. An accurate determination of identity is needed to make sound access control decisions.

A wide range of mechanisms is employed to authenticate identity, utilizing various classes of identity credentials. For physical access, individual identity has traditionally been authenticated by use of paper or other non-automated, hand-carried credentials, such as driver's licenses and badges. Access authorization to computers and data has traditionally been authenticated through user-selected passwords. More recently, cryptographic mechanisms and biometric techniques have been used in physical and logical security applications, replacing or supplementing the traditional credentials.

The strength of the authentication that is achieved varies, depending upon the type of credential, the process used to issue the credential, and the authentication mechanism used to validate the credential. This document establishes a standard for a Personal Identity Verification (PIV) system based on secure and reliable forms of identification credentials issued by the Federal government to its employees and contractors. These credentials are intended to authenticate individuals who require access to Federally controlled facilities, information systems, and applications. This standard addresses requirements for initial identity proofing, infrastructures to support interoperability of identity creden-

tials, and accreditation of organizations and processes issuing PIV credentials.

1.1 Purpose

This standard defines a reliable, government-wide PIV system for use in applications such as access to Federally controlled facilities and information systems. This standard has been developed within the context and constraints of Federal law, regulations, and policy based on information processing technology currently available and evolving.

This standard specifies a PIV system within which common identification credentials can be created and later used to verify a claimed identity. The standard also identifies Federal government-wide requirements for security levels that are dependent on risks to the facility or information being protected

1.2 Scope

Homeland Security Presidential Directive 12 [HSPD 12], signed by the President on August 27, 2004, established the requirements for a common identification standard for identification credentials issued by Federal departments and agencies to Federal employees and contractors (including contractor employees) for gaining physical access to Federally controlled facilities and logical access to Federally controlled information systems. HSPD 12 directs the Department of Commerce to develop a Federal Information Processing Standards (FIPS) publication to define such a common identification credential. In accordance with HSPD 12, this standard defines the technical requirements for the identity credential that—

- Is issued based on sound criteria for verifying an individual employee's identity
- Is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation
- Can be rapidly authenticated electronically
- Is issued only by providers whose reliability has been established by an official accreditation process.

This standard defines authentication mechanisms offering varying degrees of security. Federal departments and agencies will determine the level of security and authentication mechanisms appropriate for their applications. This standard does not specify access control policies or requirements for Federal departments and agencies. Therefore, the scope of this standard is limited to authentication of an individual's identity. Access authorization decisions are outside the scope of this standard.

1.3 Document Organization

This standard is composed of two parts, PIV-I and PIV-II. The first part (PIV-I) describes the minimum requirements for a Federal personal identification system that meets the control and security objectives of HSPD 12, including personal identity proofing, registration, and issuance, but does not address the interoperability of PIV Cards and systems among departments and agencies.

The second part (PIV-II) provides detailed technical specifications to support the control and security objectives in PIV-I as well as interoperability among Federal

departments and agencies. PIV-II describes the policies and minimum requirements of a PIV Card that allows interoperability of credentials for physical access and logical access. The physical card characteristics, storage media, and data elements that make up identity credentials are specified in this standard. The interfaces and card architecture for storing and retrieving identity credentials from a smart card are specified in NIST Special Publication 800-73 (SP 800-73), Interfaces for Personal Identity Verification. Similarly, the requirements for collection and formatting of biometric information are specified in NIST Special Publication 800-76 (SP 800-76), Biometric Data Specification for Personal Identity Verification.

All sections in this document are *normative* (i.e., mandatory for compliance) unless specified as *informative* (i.e., non-mandatory). Following is the structure of this document:

+ Section 1, Introduction, provides background information for understanding the scope of this standard. This section is *informative.*

+ Section 2, Common Identification, Security, and Privacy Requirements, outlines the requirements for PIV-I, by establishing the control and security objectives for compliance with HSPD 12.

+ Section 3, PIV System Overview, serves to provide a PIV system overview. This section is *informative.*

+ Section 4, PIV Front-End Subsystem, provides the requirements for the components of the PIV

front-end subsystem. Specifically, this section defines requirements for the PIV Card, logical data elements, biometrics, cryptography, and card readers.

+ Section 5, PIV Card Issuance and Management Subsystem, defines the components and processes that are part of the PIV-II. It also provides the requirements and specifications related to this subsystem.

+ Section 6, PIV Card Authentication, defines a suite of identity authentication mechanisms that are supported by the PIV Card, and their applicability in meeting the requirements of graduated levels of identity assurance.

+ Appendix A, PIV Processes, provides two models for identity proofing, registration, issuance, and maintenance of identity credentials. This section is *informative*.

+ Appendix B, PIV Validation, Certification, and Accreditation, provides guidance for the compliance with this document.

+ Appendix C, Background Check Descriptions, provides the requirements for background checks. This section is *informative*.

+ Appendix D, PIV Object Identifiers, provides additional details for the PIV objects identified in Section 4.

+ Appendix E, Physical Access Control Mechanisms, discusses the Physical Access Control Systems (PACS) assurance profiles and maps

them to the FIPS 201 assurance levels. This section is *informative*.

+ Appendix F, Glossary of terms and Acronyms, describes the vocabulary and textual representations used in the document. This Section is *informative*.

+ Appendix G, References, lists the specifications and standards referred to in this document. This section is *informative*.

PART 1: PIV-I

This part describes the minimum requirements for a Federal personal identification system that meets the control and security objectives of HSPD 12, including the personal identity proofing process.

Implementation Timeframe: In accordance with HSPD 12, departments and agencies shall meet the requirements of this part no later than eight months following promulgation of the standard.

2. Common Identification, Security, and Privacy Requirements

This section provides the requirements for the first part of the standard. PIV-I addresses the fundamental control and security objectives outlined in HSPD 12, including the personal identity proofing process for employees and contractors. Note that PIV-I does not address interoperability of PIV credentials and systems among agencies or compel the use of a single, universal credential.

2.1 Control Objectives

[HSPD-12] established control objectives for secure and reliable identification of Federal employees and contractors. These control objectives, provided in paragraph 3 of the directive, are quoted here:

> (3) "Secure and reliable forms of identification" for purposes of this directive means identification that (a) is issued based on sound criteria for verifying an individual employee's identity; (b) is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation; (c) can be rapidly authenticated electronically; and (d) is issued only by providers whose reliability has been established by an official accreditation process.

Each agency's PIV implementation shall meet the four control objectives (a) through (d) listed above such that—

+ Credentials are issued 1) to individuals whose true identity has been verified and 2) after a proper authority has authorized issuance of the credential;
+ Only an individual with a background investigation on record is issued a credential;
+ An individual is issued a credential only after presenting two identity source documents, at least one of which is a valid Federal or State government issued picture ID;
+ Fraudulent identity source documents are not accepted as genuine and unaltered;

+ A person suspected or known to the government as being a terrorist is not issued a credential;
+ No substitution occurs in the identity proofing process. More specifically, the individual who appears for identity proofing, and whose fingerprints are checked against databases, is the person to whom the credential is issued;
+ No credential is issued unless requested by proper authority;
+ A credential remains serviceable only up to its expiration date. More precisely, a revocation process exists such that expired or invalidated credentials are swiftly revoked;
+ A single corrupt official in the process may not issue a credential with an incorrect identity or to a person not entitled to the credential;
+ An issued credential is not modified, duplicated, or forged.

2.2 PIV Identity Proofing and Registration Requirements

For compliance with the PIV-I control objectives, departments and agencies shall follow an identity proofing and registration process that meets the requirements defined below when issuing identity credentials.

+ The organization shall adopt and use an approved identity proofing and registration process.
+ The process shall begin with initiation of a National Agency Check with Written Inquiries

(NACI) or other Office of Personnel Management (OPM) or National Security community investigation required for Federal employment. This requirement may also be satisfied by locating and referencing a completed and successfully adjudicated NACI. At a minimum, the FBI National Criminal History Check (fingerprint check) shall be completed before credential issuance. Beginning with Part 2, Identity credentials issued to individuals without a completed NACI or equivalent must be electronically distinguishable from identity credentials issued to individuals who have a completed investigation. Appendix C, Background Check Descriptions, provides further details on NAC and NACI.

+ The applicant must appear in-person at least once before the issuance of a PIV credential.

+ During identity proofing, the applicant shall be required to provide two forms of identity source documents in original form. The identity source documents must come from the list of acceptable documents included in *Form I-9, OMB No. 1115-0136, Employment Eligibility Verification*. At least one document shall be a valid State or Federal government-issued picture identification (ID).

+ The PIV identity proofing, registration and issuance process shall adhere to the principle of separation of duties to ensure that no single individual has the capability to issue a PIV credential without the cooperation of another authorized person.

The identity proofing and registration process used when verifying the identity of the applicant shall be accredited by the department or agency as satisfying the requirements above and approved in writing by the head of the Federal department or agency. Two examples of processes that meet these requirements are provided in Appendix A, PIV Processes.

These requirements also apply to citizens of foreign countries who are working for the Federal government overseas. However, a process for registration and approval must be established using a method approved by the U.S. Department of State's Bureau of Diplomatic Security, except for employees under the command of a U.S. area military commander. These procedures may vary depending on the country.

2.3 PIV Issuance and Maintenance Requirements

For compliance with the PIV-I control objectives, departments and agencies shall meet the requirements defined below when issuing identity credentials. The issuance and maintenance process used when issuing credentials shall be accredited by the department as satisfying the requirements below and approved in writing by the head of the Federal department or agency. Two examples of processes that meet these requirements are provided in Appendix A.

+ The organization shall use an approved PIV credential issuance and maintenance process.
+ The process shall ensure completion and successful adjudication of a National Agency Check (NAC), National Agency Check with Written Inquiries (NACI), or other OPM or National

Security community investigation as required for Federal employment. The PIV credential shall be revoked if the results of the investigation so justify.

+ At the time of issuance, verify that the individual to whom the credential is to be issued (and on whom the background investigation was completed) is the same as the intended applicant/recipient as approved by the appropriate authority.

+ The organization shall issue PIV credentials only through systems and providers whose reliability has been established by the agency and so documented and approved in writing (i.e., accredited).

2.4 PIV Privacy Requirements

HSPD 12 explicitly states that "protect[ing] personal privacy" is a requirement of the PIV system. As such, all departments and agencies shall implement the PIV system in accordance with the spirit and letter of all privacy controls specified in this standard, as well as those specified in Federal privacy laws and policies including but not limited to the E-Government Act of 2002 [E-Gov], the Privacy Act of 1974 [PRIVACY], and Office of Management and Budget (OMB) Memorandum M-03-22 [OMB322], as applicable.

Departments and agencies may have a wide variety of uses of the PIV system and its components that were not intended or anticipated by the President in issuing [HSPD-12]. In considering whether a proposed use of the PIV system is appropriate, departments and agen-

cies shall consider the aforementioned control objectives and the purpose of the PIV standard, namely "to enhance security, increase Government efficiency, reduce identity fraud, and protect personal privacy." [HSPD-12] No department or agency shall implement a use of the identity credential inconsistent with these control objectives.

To ensure the privacy of applicants, departments and agencies shall do the following:

+ Assign an individual to the role of senior agency official for privacy. The senior agency official for privacy is the individual who oversees privacy-related matters in the PIV system and is responsible for implementing the privacy requirements in the standard. The individual serving in this role may not assume any other operational role in the PIV system.

+ Conduct a comprehensive Privacy Impact Assessment (PIA) on systems containing personal information in identifiable form for the purpose of implementing PIV, consistent with [E-Gov] and [OMB322]. Consult with appropriate personnel responsible for privacy issues at the department or agency (e.g., Chief Information Officer) implementing the PIV system.

+ Write, publish, and maintain a clear and comprehensive document listing the types of information that will be collected (e.g., transactional information, personal information in identifiable form [IIF]), the purpose of collection, what information may be disclosed to whom during the life of the credential, how the information will be

protected, and the complete set of uses of the credential and related information at the department or agency. PIV applicants shall be provided full disclosure of the intended uses of the PIV credential and the related privacy implications.

+ Assure that systems that contain IIF for the purpose of enabling the implementation of PIV are handled in full compliance with fair information practices as defined in [PRIVACY].

+ Maintain appeals procedures for those who are denied a credential or whose credentials are revoked.

+ Ensure that only personnel with a legitimate need for access to IIF in the PIV system are authorized to access the IIF, including but not limited to information and databases maintained for registration and credential issuance.

+ Coordinate with appropriate department or agency officials to define consequences for violating privacy policies of the PIV system.

+ Assure that the technologies used in the department or agency's implementation of the PIV system allow for continuous auditing of compliance with stated privacy policies and practices governing the collection, use, and distribution of information in the operation of the program.

+ Utilize security controls described in NIST SP 800-53, Recommended Security Controls for Federal Information Systems, to accomplish privacy goals, where applicable. [SP800-53]

+ Ensure that the technologies used to implement PIV sustain and do not erode privacy protections relating to the use, collection, and disclosure of information in identifiable form. Specifically, employ an electromagnetically opaque sleeve or other technology to protect against any unauthorized contactless access to information stored on a PIV credential.

NASA Procedural Requirements **NPR 1600.1**

Effective: November 03, 2004

Expiration Date: November 03, 2009

COMPLIANCE IS MANDATORY

NASA Security Program Procedural Requirements w/Change 1 (11/08/2005)

* * * * *

Preface

P.1. Purpose

a. This NASA Procedural Requirements (NPR) establishes Agency-wide security program implementation requirements set forth in NASA Security Policy Directive (NPD) 1600.2, as amended.

b. This NPR prescribes NASA Security Program procedural requirements to assist NASA Centers and component facilities in executing the NASA security program to protect people, property, and information. It establishes security program standards and specifications necessary to achieve Agency-wide security program consistency and uniformity, while allowing for reasonable flexibility in implementing risk management principles, where appropriate. It also provides for the assignment of management security responsibilities.

P.2. Applicability

This NPR is applicable to NASA Headquarters and all NASA Centers including Component Facilities, the Jet Propulsion Laboratory (JPL) and other NASA Contractors, grant recipients, and other partners to the extent specified in their contracts or agreements.

P.3. Authority

42 U.S.C. 2455, 2456, 2456a, and 2473(c)—Sections 304 and 203(c), respectively, of the National Aeronautics and... Space Act of 1958.

* * * * *

2.19 Recordkeeping

2.19.1. Center Security Offices shall create and securely maintain personnel security investigative and screening records on all NASA civil service and contractor personnel security cases.

2.19.1.1. Files shall be maintained for a minimum of two (2) years after the individual's employment or access to NASA facilities or IT systems is terminated.

2.19.1.2. Files shall include the original forms submitted to initiate the investigation and screening, a summary of the results of any investigative and screening activity, a record of the final decision, and any subsequent actions.

2.19.1.3. Security offices shall safeguard these files pursuant to NPD 1440.6G, NASA Records Management, and NPR 1441.1, NASA Records Retention Schedules.

2.19.2. Subjects of personnel security investigations and screenings may request copies of excerpts, summaries, or any analytical extract of information from the NASA case file under the Freedom of Information and Privacy Act procedures. The subject may not be provided a copy of any third party investigations (i.e., OPM, DSS, FBI). The subject must obtain copies of the third party investigation directly from the appropriate agency.

Chapter 4: NASA Personnel Security Program: Risk Designation Process, Background Investigations, and Access Determinations for NASA Contractor Employees

4.1 General

4.1.1. It is an inherent Government function under the "housekeeping" principles authorized by the U.S. Congress for a Government agency to protect its facilities and their occupants from harm and its information and technology from improper disclosure.

4.1.2. HSPD-12, "Policy for a Common Identification Standard for Federal Employees and Contractors," and Federal Information Processing Standards (FIPS) 201, "Personnel Identity Verification (PIV) of Federal Employees and Contractors," requires appropriate investigation and adjudication for reliability prior to the issuance of permanent NASA photo-ID.

4.1.3. This chapter establishes position risk designation process, security investigative requirements, and reliability determinations for NASA contractors, Intergovernmental Personnel Act (IPA) personnel, grantees, research associates, co-op students, associated foreign

nationals, lawful permanent resident (PARs), volunteers, (hereinafter known as contract employees), located on or within a NASA Center, component facility, or accessing NASA information systems remotely.

4.1.4. NASA contractor employees who are granted continuing and official unescorted access to Government facilities, buildings, information, and IT resources are subject to specific investigative requirements similar to the suitability determination requirements imposed by statute upon NASA Federal employees in chapter 3. This investigation provides NASA management necessary information to determine if an individual's fitness or eligibility to promote the efficiency of NASA's mission, initial access or continued presence on the installation, and access to unclassified IT resources is consistent with the safety and security of the U.S. Government, NASA, and the individual Center.

4.1.5. No NASA contractor employee shall be issued a permanent NASA photo-ID, granted access to NASA Centers or facilities, granted access to NASA IT systems, or sensitive information without, at a minimum, the completion of a NAC and submission of required investigative paperwork required to complete the "Inquiries" portion of the NACI, and interim favorable access determination by NASA Security Officials. (The NAC must be accomplished prior to or NLT than 10 working days after start of employment.)

a. Temporary photo ID or visitor badges, issued to contractor employees, who have not submitted the appropriate investigations forms, will expire at the 10 working day time period.

b. Further delays in forms submittal will require the individuals' supervisor to sponsor one-day visit requests up to an additional 5 working days. The supervisor will also be required to escort the individual.

c. Upon expiration of the additional 5 working days, all issued temporary badges/passes and approved accesses will be terminated pending submittal of completed forms. Centers must establish the necessary procedures to ensure abuse of the visitor/temporary badging system does not occur.

4.2 Applicability

4.2.1. This chapter is applicable to NASA contracts, grants, cooperative agreements, and other binding agreements (MOA, MOU, etc.) that meet one or all of the following criteria:

4.2.1.1. For Services (research, operations, support);

4.2.1.2. Performed on or within Government facilities, and/or;

4.2.1.3. Require remote access to unclassified NASA IT Systems.

4.2.2. Unlike many Federal agencies, NASA's user community is a very diverse group which includes U.S. citizens, non-U.S. Citizens (lawful permanent resident (LPR's) and Foreign Nationals) employed by NASA component facilities, contractor organizations, international partners working under the terms of an intergovernmental agreement, university partners working under a grant, individual personnel volunteering their ser-

vices, private consultants, or other organizations providing support to NASA via memorandums of agreement (MOA) or memorandums of understanding (MOU).

4.2.3. The requirements of this chapter are designed to be equitable with the employment suitability criteria for NASA Civil Service employees, outlined in chapter 3, and shall be uniformly and consistently applied to ensure maximum protection of NASA assets.

4.2.4. Non-federal employees and contractor personnel of tenant organizations shall maintain Center access eligibility in accordance with this chapter and any Center specific processes and procedures established.

* * * * *

DUPLICATE ORIGINAL

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT	1. CONTRACT ID CODE	PAGE	OF	PAGES
	NAS7	1		2

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
32	See Block 16C		

6. ISSUED BY	CODE	7. ADMINISTERED BY (If other than item 6)	CODE
National Aeronautics and Space Administration NASA Management Office-JPL 4800 Oak Grove Drive Pasadena, CA 91109			

8. NAME AND ADDRESS OF CONTRACTOR (No., Street, county, State and ZIP Code)		9A. AMENDMENT OF SOLICITATION NO.
California Institute of Technology 1201 East California Blvd. Pasadena, CA 91125	(X)	9B. DATED (SEE ITEM 11)
	X	10A. MODIFICATION OF CONTRACT/ORDER NO. NAS7-03001
		10B. DATED (SEE ITEM 13) 11/26/2002
CODE	FACILITY CODE	

157

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)

Not applicable

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

(X) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.

B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).

C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:

X D. OTHER (Specify type of modification and authority)

Bi-lateral modification pursuant to FAR 43.103(a) and Mutual Agreement of the Parties

E. IMPORTANT: Contractor ☐ is not, ☒ is required to sign this document and return 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

FAR Clause 52.204-9, "Personal Identity Verification of Contractor Personnel" is incorporated into Part II – Contract Clauses, Section I - Contract Clauses, I-1 Listing of Clauses, I. Federal Acquisition Regulation (48 CFR CHAPTER 1) of the prime contract as delineated on page 2.

– Continued –

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
Vice President for Business and Finance	Thomas M. Servilla Contracting Officer
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED
(Signature of person authorized to sign)	8/04/06
16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
BY (Signature of Contracting Officer)	8/7/06

NSN 7540-01-152-8070
PREVIOUS EDITION UNUSABLE

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STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA FAR (48 CFR) 53.243

Block 14 (continued) Description of Amendment/Modification

In support of NASA security measures and policies, FAR Clause 52.204-9, "Personal Identity Verification of Contractor Personnel" is incorporated into the prime contract by reference under Part II – Contract Clauses, Section I-Contract Clauses, I-1 Listing of Clauses, I. Federal Acquisition Regulation (48 CFR CHAPTER 1).

The full text is cited in this modification for reference:

52.204-9 Personal Identity Verification of Contractor Personnel

Personal Identity Verification of Contractor Personnel (Jan 2006)

(a) The Contractor shall comply with agency personal identity verification procedures identified in the contract that implement Homeland Security Presidential Directive -12 (HSPD-12), Office of Management and Budget (OMB) guidance M-05-24, and Federal Information Processing Standards Publication (FIBS PUB) Number 201.

(b) The Contractor shall insert this clause in all subcontracts when the subcontractor is required to have physical access to a federally-controlled facility or access to a Federal information system.

(End of clause)

END OF MODIFICATION NO. 32

DUPLICATE ORIGINAL

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT	1. CONTRACT ID CODE	PAGE OF PAGES
		1 | 1

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
39	01/29/2007	N/A	

6. ISSUED BY	CODE	7. ADMINISTERED BY (If other than Item 6)	CODE
NASA/Management Office 4800 Oak Grove Drive M/S 180-802 Pasadena CA 91109	NMO	NASA/Management Office 4800 Oak Grove Drive M/S 180-802 Pasadena CA 91109	NMO

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)	(X)	9A. AMENDMENT OF SOLICITATION NO.
CALIFORNIA INSTITUTE OF TECHNOLOGY Attn: NONE SPECIFIED 1201 EAST CALIFORNIA BLVD. PASADENA CA 91125		9B. DATED (SEE ITEM 11)
	X	10A. MODIFICATION OF CONTRACT/ORDER NO. NAS7-03001
		10B. DATED (SEE ITEM 11) 11/26/2002
CODE	FACILITY CODE	

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)
N/A

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

CHECK ONE	
	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
X	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor ☒ is not, ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Authority: Contract Clause G-14(d), NASA Issuance Systems and Government Policies, and FAR Clause 52.243-2, Changes - Cost Reimbursement Alternative IV/V.

In Conjunction with Homeland Security Presidential Directive (HSPD)12, and FAR Clause 52.204-9, Personal Identity Verification of Contractor Personnel, the Contractor is hereby directed to comply with the attached Personal Identity Verification (PIV) Card Issuance Procedures referenced under NASA Procurement Information Circular 06-01, dated January 18, 2006.

End of Modification

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and is in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
		Robert Democh	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
_____ (Signature of person authorized to sign)		Robert Democh (Signature of Contracting Officer)	01/29/2007

NSN 7540-01-152-8070
Previous edition unusable

STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

DUPLICATE ORIGINAL

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT	1. CONTRACT ID CODE	PAGE OF PAGES
		1 3

2. AMENDMENT/MODIFICATION NO.	3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)
45	APR 19 2007	RI/A	

6. ISSUED BY	CODE	1DMO	7. ADMINISTERED BY (If other than item 6)	CODE	1DMO
NASA/Management Office 4800 Oak Grove Drive M/S 180-802 Pasadena CA 91109			NASA/Management Office 4800 Oak Grove Drive M/S 180-802 Pasadena CA 91109		

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)	(x)	9A. AMENDMENT OF SOLICITATION NO.
CALIFORNIA INSTITUTE OF TECHNOLOGY Attn: NONE SPECIFIED 1201 EAST CALIFORNIA BLVD. PASADENA CA 91125		9B. DATED (SEE ITEM 11)
	X	10A. MODIFICATION OF CONTRACT/ORDER NO. NAS7-03001
		10B. DATED (SEE ITEM 11) 11/26/2002

CODE	FACILITY CODE

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.
Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGEMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)
See Schedule

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

CHECK ONE	
	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
X	D. OTHER (Specify type of modification and authority) Mutual Agreement of Both Parties

E. IMPORTANT: Contractor ☐ is not. ☒ is required to sign this document and return 1 copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

This modification definitizes contract modification 39 dated January 29, 2007.

1. H-37, SECURITY, paragraph (a)(2)(v)(A) is revised as follows:

"(v) Chapter 6 is incorporated into the contract with the following understandings:

(A) Through Contract Modification 32, the Parties incorporated FAR Clause 52.204-9, "Personal Identity Verification (PIV) of Contractor Personnel." Through contract Modification 39, the Government incorporated the Personal Identity Verification Issuance Procedures referenced in Procurement Procedures PIC 06-01. Notwithstanding Modification 39, the Parties further hereby agree:

Continued ...

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)	16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)
Jose W. Currie Vice President for Business and Finance	Robert L. Deimah Contracting Officer
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED
4/9/07	16B. UNITED STATES OF AMERICA Robert L. Deimah (Signature of Contracting Officer)
	16C. DATE SIGNED APR 19 2007

NSN 7540-01-152-8070
Previous edition unusable

STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

CONTINUATION SHEET	REFERENCE NO. OF DOCUMENT BEING CONTINUED NAS7-03001/45	PAGE 2	OF 3

NAME OF OFFEROR OR CONTRACTOR
CALIFORNIA INSTITUTE OF TECHNOLOGY

ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)
	(i) PIC 06-01 is considered to be issued as operational guidance. (ii) The Contractor shall, within 30 days from the effective date of this modification, submit to the Contracting Officer for review: (a) an implementation plan detailing how the PIC, PIV credentialing, and NASA badge issuance will be implemented by the Contractor. The plan shall be updated when major changes to the plan have occurred. (b) an updated cost proposal for implementing the PIC, PIV credentialing, and NASA badge issuance by the Contractor. The cost proposal shall be consistent with Contractor defined responsibilities and Agency procedures. (iii) The Government will provide as Government Furnished Property or Services: (a) four (4) operational badge issuing systems (including software) by May 15, 2007, and (b) printed PIV-II credentials on an on-going basis commencing May 22, 2007, and (c) Access to the Office of Personnel Management's Electronic Questionnaires for Investigations Processing (e-QIP) system for background investigation commencing April 11, 2007, and (d) suitability determinations and adjudication as may be required (e.g. Homeland Security Presidential Directive - 12, Office of Management and Budget guidance M-05-24, or Federal Information Processing Standards Publication Number 201). (iv) The Contractor shall charge the associated costs to an appropriate burden account. (v) The written procedure identified in paragraph (a) above shall be consistent with NASA procedures and detail the Contactor defined roles, responsibilities, and process for issuing Continued ...				

CONTINUATION SHEET	REFERENCE NO. OF DOCUMENT BEING CONTINUED NAS7-03001/45	PAGE 3 OF 3

NAME OF OFFEROR OR CONTRACTOR

CALIFORNIA INSTITUTE OF TECHNOLOGY

ITEM NO. (A)	SUPPLIES/SERVICES (B)	QUANTITY (C)	UNIT (D)	UNIT PRICE (E)	AMOUNT (F)
	PIV Credentials and NASA badges for the Contractor's employees, subcontractor personnel, and affiliates. The Contractor shall perform the roles and responsibilities which are not inherently governmental (e.g., Sponsor; Enrollment Officer; Issuer). Further, the Contractor shall update its written procedure as may be necessary to remain consistent with Agency procedures. The Contractor shall submit the updated written procedures to the Contracting Officer for review. (vi) The Contractor shall, following the review by the Contracting Officer, implement its written procedures on an ongoing basis; provided, however, the Contractor shall implement its written procedures to ensure PIV Credentials and NASA badges are issued for current employees, subcontractor personnel, and affiliates by October 27, 2007." End of Modification No. 45.				

Contract Appendix 1

NASA and Caltech Understanding Concerning the NASA Jet Propulsion Laboratory

This contract appendix provides the historical context of the NASA/JPL relationship. This appendix is a non-binding statement with no contractual implications, and does not augment, supplement or clarify requirements set forth in the contract. Any statements contained in this appendix, including the advantages that NASA currently sees through its relationship with Caltech operating JPL as a university managed FFRDC, does not commit NASA to continuing the relationship. This appendix explains Caltech's and NASA's view on the issues covered herein, but does not commit NASA to any of the precepts set forth in the language. All statements or agreements outside of the contract (including, but not limited to past Memoranda of Understanding) are void.

Background

The foundations for the Jet Propulsion Laboratory ("JPL") were laid in the late 1930's by Professor Theodore von Karman and his graduate students of the Guggenheim Aeronautical Laboratory of the California Institute of Technology ("Caltech"). Their pioneering experiments with rocket engines initially were funded by private Caltech sources, but with the onset of World War II, objectives and sponsorships became entirely military. By 1944, a permanent organization had evolved, and Caltech formally established the "Jet Propulsion Laboratory." In the years that followed, JPL pioneered a series of advanced rocket vehicles, mostly

for the Army Ordnance Corps, including Corporal and Sergeant. Finally, JPL developed Explorer I, the United States' first Earth-orbiting satellite.

On December 3, 1958, President Eisenhower transferred the responsibilities for JPL from the Army to the newly created National Aeronautics and Space Administration ("NASA"), together with the Government owned property used by JPL. A contract for research, development and related activities was entered into between NASA and Caltech. That work continues today under Contract NAS7-1407.

NASA/Caltech Relationship for Operation of the Jet Propulsion Laboratory

JPL has a dual character: it is a NASA-owned facility in Pasadena, California, as well as an operating division of Caltech staffed with regular Caltech employees. Caltech has operated JPL as a NASA Federally Funded Research and Development Center (FFRDC) since 1959 to meet certain Government research and development needs which could not be met as effectively by existing Government resources or normal contractor relationships. Contractors operating FFRDCs are allowed access beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to Government employees and facilities. As a part of this special relationship, it is also required that JPL be operated in the public interest with objectivity and independence, be free from organizational conflicts of interest, and have full disclosure of its affairs to NASA.

The JPL facility and the employees with their knowledge, shared experiences and traditions of excellence, are together a major national capability. Caltech and NASA each recognize a shared interest in assuring the proper use and maintenance of that national capability, not only for NASA programs but also for other programs of national interest which require the unique capabilities of JPL.

On its part, Caltech is fully committed as set forth in the Contract, as its principal mission at JPL, to carrying out NASA programs, projects and tasks assigned to JPL. In doing so, Caltech recognizes that JPL is a full member of the NASA team and, as such, must recognize and appropriately comply with those applicable laws, regulations, directives and established procedures, as are necessary to the orderly carrying out of NASA's programs and other activities. Caltech also recognizes that in addition to his responsibilities as the head of an operating division of Caltech, the Director of JPL has responsibilities to NASA similar to those of the NASA Center Directors.

It is recognized by Caltech and NASA that JPL through its connection with Caltech represents a unique educational and research resource of significance to the university community generally, and that JPL, in turn, needs close and continuing interaction with broad segments of the university community in order to carry out its mission for NASA. Accordingly, NASA encourages a high degree of interaction between the Caltech Campus and JPL at all levels, and between JPL and the university community. For its part, Caltech recognizes that it must act not only in its own interest but in the interests of the entire university community in carrying out

its JPL activities, however; Caltech is still ultimately responsible to NASA for carrying out NASA programs. Caltech has a need and an obligation to facilitate the involvement of the ablest available scientists, engineers, and students from the entire university community in NASA and other Government-sponsored research and development at JPL. Caltech regards it's undertaking at JPL not only as a contract, but also as a public trust.

In order to expand further the interaction between the university community and JPL, part-time participation of JPL employees in research supervision and in teaching on the Caltech Campus and with other universities is specifically encouraged by Caltech and NASA, as is the part-time work at JPL by faculty members of the Caltech Campus and other universities. Further, Caltech will make its best effort to promote additional postdoctoral research opportunities at JPL, consistent with JPL's programmatic obligations. Additionally, the part-time utilization of faculty and students at JPL will continue to be encouraged by Caltech. It is understood that these activities should not interfere with the support of NASA programs, and that NASA has the right to review JPL work in these areas for reasonableness and appropriateness.

In line with its responsibility for JPL, Caltech recognizes the continuing need for the management of an advanced technology laboratory such as JPL to have oversight and direction (that is consistent with NASA oversight and direction) from broadly experienced industrial, university, and professional leaders on scientific, technological, programmatic and general management matters. In recognition of this need, the Caltech Board of Trustees has established a JPL Committee of the Board. The

Board of Trustees of Caltech will continue to ensure that the Committee is composed of persons with relevant experience and recognized achievements in industry, universities and governmental areas. The Committee will hold regularly scheduled meetings to provide oversight and direction to Caltech/JPL on operating policy and procedures, relationships with NASA, other Federal agencies, industry, universities and the scientific community.

NASA and Caltech believe that in order to achieve the unique benefits available through the close association of JPL with Caltech, on the one hand, and to meet the JPL responsibility for major programmatic objectives, on the other hand, JPL as an institution must encompass a full spectrum of activities from basic research all the way through to the conduct and management of space flight missions. Further, JPL must be a technical "doing" organization with the fraction of total effort performed in-house highest at the research end of the spectrum of activities. To ensure a synergistic relationship with the U.S. advanced technology industry, JPL will utilize industrial capabilities to the fullest extent reasonable—consistent with the necessity that its technical management be based upon current in-depth technical understanding and first-hand implementation expertise. The necessary balance between maximum utilization of industry, on the one hand, and maintenance and development of credible technical and management skills at JPL, on the other, will be considered by NASA in program implementation decisions. Although NASA can make no commitment to the future balance of JPL directed versus competed programs, NASA's general goal is to carry out at least one key challenging flight mission

in an in-house implementation mode, and other flight systems in various system contract implementation modes appropriate to the distribution of technological inheritance within the industry and at JPL.

JPL, in developing and disseminating advanced technology, has contributed significantly to the growth and capability of U.S. advanced technology industry. Caltech and NASA are committed to the continuation of that process. Caltech, for its part, will make its best effort to interface appropriately with the private sector to facilitate and encourage the dissemination, further development and broad commercial utilization of new technology arising from JPL efforts. JPL will participate in NASA's Technology Utilization Program to apply aerospace technology from throughout NASA to non-aerospace applications. NASA, for its part, will make its best effort to facilitate the administrative processes involved in fostering the utilization of technology by U.S. industry developed by JPL. NASA's program to provide potential domestic users early access to NASA-developed technology having significant early commercial potential prior to general publication or export of the technology will be implemented at JPL by an early screening of NASA-sponsored work having such early commercial potential and JPL will consult with NASA on the dissemination of technical data resulting from such work.

NASA and Caltech recognize the importance of JPL to the Nation and believe that judicious efforts by JPL to identify and seek potential, appropriate work which is sponsored by agencies other than NASA, but which benefit NASA programs and makes use of JPL's special

competencies or falls within their purpose or mission is encouraged.

NASA and Caltech believe that the facilities at JPL should be at a level of quality and functional capability as is necessary to maintain JPL in the forefront of space research and development. A review of facility requirements will be conducted by JPL annually and NASA will take the results of those reviews into consideration in the annual budgetary cycles.

NASA recognizes the special character of JPL within the NASA family and the desirability of maximizing the benefits which this university-related, FFRDC can bring to NASA. In carrying out its mission JPL will adopt programmatic management policies and practices compatible with those elsewhere in the Agency and will strive to achieve the highest levels of performance, safety, and cost effectiveness. While recognizing the importance of its interface with NASA, the Laboratory will conduct its business, administrative, and personnel affairs in a manner consistent with its role as an operating division of Caltech, and it will seek to adopt the best business practices available. NASA will consider JPL's FFRDC status as a university managed FFRDC and other factors to ensure that Government policies to be applied to JPL are appropriate.

NASA INTERIM DIRECTIVE (NPR-1600.1)

Date: May 24, 2007

Office of Security and Program Protection

Personal Identity Verification (PIV) Policy and Procedures

1. Purpose

This requirements document establishes an Agency-wide policy for the creation and issuance of federal credentials at NASA.

2. Scope

The policies and procedures identified within this document cover the only approved processes for NASA to issue federal credentials pursuant to Federal Information Processing Standards Publication Number 201-1 (FIPS 201), and Homeland Security Presidential Directive (HSPD) 12.

3. Applicability

This policy applies to all NASA facilities, organizational components, employees, contractors, personnel completing work through Space Act Agreements or Memorandums or Agreement/Understanding, those assigned or detailed under the intergovernmental Personnel Act, partners and visitors, where appropriate, in achieving NASA missions, programs, projects, and institutional requirements. Contractors, as used in this Directive, are defined to include contractor organizations and employees or subcontractors, recipients of grants and cooperative agreements and employees or sub-recipients, and all other organizations or employees that are reim-

bursed by NASA through appropriated funds. This NID Augments NPR1600.1 and will be in effect for one year until NPR 1600.1 is revised, whichever occurs first.

4. Authority

1. 42 U.S.C. § 2473(c)(1), Section 203(c)(1) of the National Aeronautics and Space Act of 1958 as amended.

5. References

1. Homeland Security Presidential Directive 12 (HSPD-12)
2. Federal Information Processing Standards Publication 201 (FIPS-201)
3. NASA Procedural Requirement (NPR) 1600.1
4. OMB Memo M-05-24, of August 5, 2005, "Implementation of Homeland Security Presidential Directive (HSPD) 12—Policy for a Common Identification Standard for Federal Employees and Contractors."
5. Federal Acquisition Regulation Clause 52.204-9, Personal Identity Verification of Contractor Personnel.
6. Executive Order 12968 of August 2, 1995.
7. X.509 Certificate Policy for the U.S. Federal PKI Common Policy Framework, v2.5 16 OCT 2006.
8. 5 CFR Section 731.202; 5 Code of Federal Regulations Section 731.501.

9. NIST Special Publication 800-79, Guidelines for the Certification and Accreditation of PIV Card Issuing Organizations.

10. Executive Order 10450 of April 17, 1953.

11. Federal Information Security Management Act of 2002 (FISMA 2002) P.L. 100-235

12. Privacy Act, 5 U.S. Code section 552a.

6. Responsibilities

All NASA employees will be required to comply with this Directive, and the implementing Directives of their respective Centers consistent with Homeland Security Presidential Directive 12 and with the Privacy Act, 5 U.S. Code section 552a. As more fully detailed herein, all Applicants will have their information protected by applicable provisions of the Privacy Act. See also section 10 of this Directive. The Assistant Administrator, Office of Security and Program Protection (AA/OSPP), is the system owner of the common badging system, (CBACS), which is used to issue Personal Identity Verification (PIV) Credentials, hereinafter "Badge," and has overall responsibility for ensuring uniformity of federal credential issuance policies and procedures throughout the agency.

All NASA organizational components shall adhere to the policies and procedures herein and promulgate implementing regulations (but no lower than the Center level) consistent with the policies and procedures set forth herein.

In accordance with this NID and other applicable regulations, Center Directors, through their Chiefs of Center

Security (CCS), supported by the Center Human Resources Office (HRO), Procurement Office, Chief Information Office and other offices as necessary, shall ensure that local operating procedures and execution conform to the policies and procedures herein. Center Directors shall ensure the Personal Identity Verification Card Issuance (PCI) chain of trust and card control is maintained to support the integration of PIV procedures, Center Directors[12] are to adhere to the principle of separation of duties as provided herein to ensure clearly that no single individual has the capability to issue a badge without the cooperation of another authorized person. PIV Authorizers and Enrollment Officials making suitability, security and/or access determinations must be members of the Federal civil servant workforce.

6.1 PIV Oversight of Roles and Responsibilities

HSPD-12 and FWS 201 define specific roles and responsibilities as follow:

* * * * *

6.2.1 Applicant

The Applicant is the individual whom a Badge is to be issued. Badges are issued to all individuals who require physical or logical access to designated NASA resources for a period of greater than 179 days. Applicants may be prospective and current NASA employees (i.e, civil servants), contractors, grantees (grants, academics, and cooperative program personnel) and foreign nationals. Applicants are responsible for: providing a basic demo-

[12] For HQ NASA, this function is accomplished by the Deputy Assistant for Headquarters Operations.

graphic data for the PIV request; submitting their photograph and fingerprints; presenting valid identity documents during enrollment; and proper handling and use of the Badge once issued. Until their own PIV request is approved, and a Badge properly issued, an individual Applicant cannot perform any other role during their processing for a Badge.

* * * * *

8. Discussion

On August 27, 2004, the President signed Homeland Security Presidential Directive 12 (HSPD-12) entitled "Policy for a Common Identification Standard for Federal Employees and Contractors," applicable to all Executive Branch departments and agencies. HSPD-12 states that, "*secure and reliable forms of identification" for purposes of this directive means identification that*:

1. *Is issued based on sound criteria for verifying an individual employee's identity;*
2. *Is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation;*
3. *Can be rapidly authenticated electronically; and*
4. *Is issued only by providers whose reliability has been established by an official accreditation process.*"

HSPD-12 charged the Secretary of Commerce with the promulgation of a "Federal standard for secure and reliable forms of identification." As a result the Secretary of Commerce published Federal Information Processing Standards Publication 201-1 (FIPS PUB 201-1) titled "Personal Identity Verification (PIV) of Federal Em-

ployees and Contractors." (Hereinafter, FIPS 201). HSPD-12 directed that the Department of Commerce promulgate uniform standards to satisfy stated control objectives. The HSPD-12 control objectives include, "*secure and reliable forms of identification" for purposes of this directive means that:*

5. *Is issued based on sound criteria for verifying an individual employee's identity;*
6. *Is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation;*
7. *Can be rapidly authenticated electronically; and*

Is issued only by providers whose reliability has been established by an official accreditation process."

Accordingly, the Secretary of Commerce published the required standards in Federal Information Processing Standards Publication 201-1 (FIPS PUB 201-1) titled "Personal Identity Verification (PIV) of Federal Employees and Contractors." (Hereinafter, FIPS 201).

FIPS 201 is, " . . . *to achieve appropriate security assurance for multiple applications by efficiently verifying the claimed identify of individuals seeking physical access to Federally controlled government facilities and electronic access to government information systems.*"

As required by HSPD-12, the standards provided in the FIPS 201 are applicable to identification issued by Federal departments to their employees, contractor employees, and others compromising the agency workforce (foreign, national, co-operatives, partners, grantees, recipients of Space Act Agreements, visitors, et al.) Waivers to Federal Information Processing Standards are

not allowed. Accordingly, FIPS 201 requires that each federal organization adopt an approved identify proofing and registration process that includes:

1. A minimum of a completed FBI National Criminal History Check (NCHC), and either the receipt of a completed background investigation or 5 days from submission of the background investigation where no disqualifying information is returned within that 5 day period. This minimum NCHC requires that the individual submit fingerprints.

2. At the time of registration (enrollment), an individual's identity is verified. The Applicant will appear in person and present two forms of identity that are listed on the Form I-9, (OMB No 1115-0136, Employment Eligibility Verification). One document will be a valid State or Federal issued picture identification. Again at the time the credentials are issued a person's identity is verified to match that at registration, usually by biometrics, before a Badge can be issued.

3. Prevent the issuance of a Badge by a single individual without the cooperation of another authorized person.

4. That the Badge is revoked if the results of an investigation warrant.

This Interim Policy Directive provides those processes required for Badge Issuance.

9. Badge Usage

The Badge provides multiple levels of assurance when validating an individual's identity. The only authorized uses of the Badge are for establishing identity for physical and logical access. Establishing identity is a separate function from authorizing access.

1. *Physical Access:* Following proper issuance of a Badge, the Office of Security and Program Protection (OSPP) can provide Badgeholders needing access with physical access to NASA facilities through the Enterprise Physical Common Access Control System (E-PACS).

2. *Logical access:* Following proper issuance of a Badge, the Office of the Chief Information Officer (OCIO) can provide Badgeholders needing access with logical access to NASA computer and data network systems through Badge card log-on procedures.

9.1 *Badge Authentication Methods for Physical Access*

The Badge will be used for visual identity authentication by an authorized individual, such as a security guard, or by electronic identity authentication, such as a card reader. The type and factor of authentication will be based on the current threat level, characteristics or profile of the facility, risk management principles, and security posture at the site, as determined by competent authority. Note that proof of identity does not necessarily mean full physical or logical access to NASA facilities, which instead must be separately determined by the CCS.

1. *Visual Authentication:* A security guard will perform a visual screening of the Badgeholder to ascertain the identified individual should be granted access to the NASA facility. The visual authentication process includes:

2. *Biometric Authentication:* Biometric authentication may be used for two, or three-factor authentication to support access control to physical and logical infrastructure on an as-needed basis, as determined by the CCS. The Badge hosts a mandatory, signed biometric that can only be read from the badge using a PIN supplied by the badge holder.

3. *PIV Asymmetric Cryptography (PKI) Authentication:* The Badge carries a mandatory asymmetric authentication private key and corresponding certificate that is used by other Federal agencies to verify the Badgeholder's identity.

9.3 *Authenticating other Agency PIV Cards*

The Badges issued by NASA will provide proof of identity to other government agencies. In like manner, other agency PIV credentials will serve as proof of identity to NASA. Note that proof of identity does not necessarily mean full physical or logical access to NASA or other Federal facilities, which instead must be separately determined by the Center Chief of Security (CCS).

10. Privacy

Privacy Protection is an essential part of NASA's implementation of HSPD-12. Particular information on HSPD-12 and related privacy issues are discussed in NASA privacy Impact Assessment (PIA) of July 20,

2006 (See Federal Register System of Record Notice (SORN) NASA 10 SECR, and PIA (http://www.nasa.gov/pdf/154145main_PDFonline.pdf).

Any and all individuals involved in the PIV issuance process must adhere strictly to the requirements of the PIA and the Privacy Act, 5 U.S.C. sec. 552a, and other implementing regulations. In accordance with the Privacy Act, the PIA sets forth the proper uses of the systems of records concerned. Information that is not authorized to be obtained and maintained shall not be requested or maintained. Any use of unauthorized information from or within PIV systems or subsystems can be the basis for disciplinary actions, including removal, in accordance with existing regulations.

* * * * *

13.1 Unsatisfactory Suitability Results

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13.1.2 Non-NASA Employees

If this process yields unfavorable information requiring that access be denied, the CCS will immediately notify the sponsor of the denial of access, per NPR 1600.1. This NPR should be consulted in full, but requires that the employer not be informed of the basis for the determination. The sponsor will advise the contractor only that the employee is being denied physical and/or logical access to NASA-controlled facilities and/or information systems.

The substantive criteria set forth in 5 C.F.R. 731.202 will be used to determine physical and/or logical ac-

cess for all Applicants to any and all NASA Centers/ component facilities.

* * * * *

13.4.2 Badge Applicants Who Are Denied A Badge

General. For all Badge applicants, if derogatory information is identified (consistent with national standards as at 5 CFR 731.202 and section 13.4 above) during any phase of the background investigation process (to include falsified information on the investigative forms/ submission), National Criminal History Check (fingerprint check), National Criminal Information Center (NCIC) check, or upon completion of the investigation) requiring resolution, the applicant is advised directly. The applicant is requested to provide any information that the applicant deems pertinent or responsive to the derogatory information. If derogatory information is resolved favorably, processing for PIV continues.

If derogatory information is not resolved favorably, the applicant is afforded the opportunity to be interviewed in person to provide information to clarify or explain the derogatory information. If, upon further inquiry, the derogatory information is favorably resolved, processing for PIV continues.

Unresolved or unfavorable derogatory information and appropriate mitigating information, including results from interviews shall again be reviewed. If upon the conclusion of the review the decision to deny issuance of a Badge is made, the CCS will send an official letter to the applicant and their sponsor advising them of the unfavorable determination and appeals procedures set forth below. Consistent with the Privacy Act, upon any

denial of access, the Contractor organization shall be informed by letter that the individual has been denied access. Unless specifically authorized by the Applicant in writing, the Contractor organization will not be provided with the reason for this determination. As discussed above, contractor employees who are denied access will not have the reason for that determination revealed to their employer.

Appeal. The Applicant, either personally or through the PIV Sponsor, may appeal to the CCS, seeking a review of the decision only as follows.

a. Within 10 working days of being notified of the denial of clearance, the individual must submit a written request for review of the denial of physical or logical access, and include any and all written materials as he desires be considered on that review. An additional 5 working days for an individual's submission shall be granted on written request, but only if the individual has made the initial request within the first 10 working days following notification of the denial of access. If the individual supplies the new information, the CCS may augment any written submission on the individual, in accordance with steps above.

b. Upon submission of the individual's written materials, the Center Director shall convene a three (3) person Access Appeals Panel to review the CCS determination. For HQ NASA, this convening function is held by the Deputy Assistant Administrator for the Headquarter Operations. The Access Appeals Panel shall consist only of Federal employees. It shall include (1) an attorney from the Center Counsel Office/Office of General Counsel; (2) a disinterested employee from the Center

Management, and (3) an employee from the Center Office of Security. For HQ NASA, the members will be from analogous offices.

c. The Access Appeals Panel will assess the CCS denial determination in terms of compliance with access standards as promulgated by 5 CFR 731.202 NPR 1600.1, and section 13.4 above. The Panel will submit a written statement briefly setting forth their conclusions and decision. The Panel may (1) uphold the denial of access, (2) reverse the denial of access, or (3) return the matter for additional and specified processing. Returning a matter without specific guidance is discouraged. A minority report may be submitted, and should be succinct as to reasons for disagreement with the priority. The Access Appeals Panel shall accomplish its review within 5 working days of the individual making a written submission. The Center Director may extend the appeal period an additional 5 working days if circumstances warrant.

d. The decision of the Panel is final, and further review of the Access Appeals Panel decision is not provided for. The NASA Administrator, however, reserves the right and authority to reject that any grant or denial of access decision (including subsequent appeal) be held in abeyance pending additional discretionary review by HQ. This reservation of authority by the Administrator does not convey any substantive right to affected individuals.

If the applicant declines to appeal, either through communicating in writing or time for the appeal has expired, the original unfavorable determination will be the final and annotated in OPM investigative databases. During

this process the individual is not granted access until the case has been resolved.

* * * * *

Office of the Director, 11:44 A.M. 6/12/2007, NASA's New ID Badge

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Date: Tue, 12 Jun 2007 11:44:36-0700

To: "All Personnel" <all.personnel@list.jpl.nasa.gov>

From: Office of the Director <ood@mail.jpl.nasa.gov>

Subject: NASA's New ID Badge

* * * * *

OFFICE OF THE DIRECTOR

June 11, 2007

TO: JPL Employees and Contractor Personnel

FROM: Eugene L Tattini

SUBJECT: NASA's New ID Badge

At the recent All Hands with the NASA Administrator, there were several questions on HSPD-12. In responding to the questions, Mike Griffin unequivocally confirmed NASA's intent to comply with the Presidential Directive. All Federal agencies must comply with HSPD-12 and NASA is no exception. JPL is a federal facility and therefore we must comply with this directive and the approach NASA is following to meet it. The purpose of this email is to confirm JPL's commitment to meeting the HSPD-12 deadline and clarify the path forward for us to meet the deadline of October 27.

Some individuals have expressed a concern about the general nature of the Authorization for Release of Information form. After discussions with NASA and the Of-

fice of Personnel Management (OPM), and reconfirmed by the Administrator, this form must be signed without any modification or alternation.

As Dr. Griffin observed, it is a privilege to work for NASA, not a right. With this said, please remember this is a personal choice. If you do not want to surrender the information to allow your background to be checked and identity verified, then you cannot work within the Federal system as a civil servant or as a contractor. JPL is an outstanding community. We are pioneers in unmanned exploration of space and do amazing work here. I hope you all complete the necessary paperwork to get a new badge and choose to remain a part of this community.

The JPL Office of Protective Services will send you one initial email invitation to begin the process and complete it within ten working days. The message here is do not wait until the last minute to complete this process. The process and our resources do not allow for delay. The change in badge is scheduled to take effect on October 27, 2007. Assuming that date is not extended by NASA Headquarters, no employee is to be admitted to JPL facilities without a new badge after October 27, 2007.

Currently, the last group scheduled to start badge initiation will be on September 28, 2007. After that date, we will not be able to process badge requests in time to issue them by the October 27, 2007 date. To be badge eligible, your application for background investigation (SF85 for 98% of JPL employees and SF85P for remaining 2%) including your fingerprints must have been accepted by OPM. Therefore, any employee who delays responding when notified, and, as a result, who is not at a minimum badge eligible by October 27, 2007, will not

be allowed to enter JPL and be placed on unpaid leave until the employee successfully completes their application for background investigation including fingerprints and signing the necessary release forms.

In summary, I know there are individuals who are unhappy with this process. However, you should understand that JPL must comply with this Directive. As long as this Presidential Directive remains in effect, we at JPL have no choice in the matter.

Therefore, Charles and I request each eligible JPL employee to fully comply in a timely fashion. It is important that we all work together to complete this process within the mandated schedule, so we can focus on our work of exploration.

DECLARATION OF JOSETTE BELLAN

I, Josette Bellan, hereby declare:

1. I am currently employed by California Institute of Technology as a Senior Research Scientist at NASA's Jet Propulsion Laboratory (JPL) and am a plaintiff in the above-encaptioned action. I offer this declaration in support of the motion for preliminary injunction filed by the plaintiffs. I have personal knowledge of the information set forth herein and if called as a witness, I would testify to the truth and accuracy of the following:

2. After studying applied mathematics at the University of Sciences in Paris, France, I entered a graduate program at Princeton University in the Department of Aerospace and Mechanical Sciences (AMS). During my graduate student years, I held an Amelia Earhart Fellowship for three consecutive years. Upon graduation in 1974, I became a Postdoctoral Fellow for one year and a Member of Research Staff for two additional years at Princeton University in the AMS Department, in the research group of Prof. Martin Summerfield, one of the two founders of JPL.

3. In 1980, I was hired by JPL as a Member of Research Staff and have worked there continuously up to the present. In 1997 I was named a Senior Research Scientist, a title reserved for approximately 80 members of the JPL research community who have, according to an outside peer review process, exhibited the excellence of a full professor at a world-class university and have substantially contributed to JPL's goals. Three years ago I was elected as one of nine Senior Research Scientists to the Senior Research Scientist Council, which is a committee representing the interests of JPL scientists

and technologists to the JPL Chief Scientist, Chief Technologist and Director.

4. For the last twelve years I have also had a position at Caltech in the Division of Engineering and Applied Science. This position was for the first ten years in the Aeronautics Department (Aero) and for the last two years in the Mechanical Engineering Department, both as Visiting Associate. Prior to these Visiting Associate appointments, I have also been a Lecturer in Aero at Caltech and taught a graduate class in Jet Propulsion. Twelve years ago, I was a Chancellor's Distinguished Lecturer at the University of California Irvine; an honorific designation.

5. During my 27 years at JPL, I have conducted theoretical research in the field of chemically reactive turbulent flows. That is, I study the physics of chemical reactions and how energy, particles, and compounds transform throughout the course of chemical reactions coupled to turbulence. In studying the physics of turbulent chemical flows, all of my work is mathematical and done using data sets, computations, and differential equations. There are no actual chemicals involved, only mathematical modeling of data sets that we create. These datasets provide information about the spatial location and timewise evolution of particles and compounds in a given reaction. The data sets that we use are all in the public domain, subject to Freedom of Information Act requests. All of the research that I do is highly theoretical and is at the level of trying to understand the basic features of turbulence and chemical reactions. My work is not directly a part of any particular mission, but is instead pure science which will contribute to NASA's work in a host of areas.

6. Over my years at JPL, I have established one of the foremost internationally recognized research groups in the area of Multiphase Flows simulations (e.g. sprays, granular flows, high-pressure turbulent flows). The research we do attracts Postdoctoral Scholars and students from all over the world.

7. I have published more than eighty peer-reviewed articles in seventeen different journals of international reputation, three review papers, and five book chapters based on my research at JPL. I have had over the years almost forty special invitations to give talks at conferences and various institutions (Universities, Laboratories and Industry) about my research and have given more than one hundred presentations at professional conferences worldwide. Several of my journal articles introduced a change of paradigm in their particular field of research. On January 7, 2000, JPL issued a press release on one of our breakthroughs in the modeling of high-pressure flows. My paper published one year ago in the *Planetary and Space Science* journal attracted international press. My manuscripts were always internally reviewed at JPL before submission, a JPL procedure meant to restrict publication of sensitive material, and I have always been given permission to publish my research with no deletion of information, as it was recognized that this research is in the realm of basic science.

8. I am a member of several professional societies: the American Institute of Aeronautics and Astronautics (AIAA), the American Society of Mechanical Engineers (ASME), the Combustion Institute, and the Institute for Liquid Atomization and Sprays (ILASS) of the Americas. I am currently the Deputy Editor (next in command after the Editor in Chief) for the international

review journal *Progress in Energy and Combustion Science* and on the Editorial Board of the international journal *Atomization and Sprays*. Additionally, from 1998 to 2004, I was an Associate Editor for the *AIAA Journal*. For twelve years I have served on the Board of Directors of ILASS of the Americas, where I am currently Chairperson of the Modeling and Simulations Technical Committee; and I have chaired the AIAA Technical Committee on Propellants and Combustion in 2004-2006.

9. In addition, I have received numerous awards and honors both by JPL and professional associations for my research. At JPL, I was awarded the Technology and Applications Programs Exceptional Service Award in 1995. I am the recipient of the 2000 Marshall Award given yearly by ILASS. I also have been sponsored three times (2000, 2004 and 2006) by the Research and Technology Agency of NATO to lecture in Europe on my research in Multiphase Flows.

10. During my entire career at JPL, I have never been required to have a security clearance, nor have I ever worked with classified materials of any type. JPL has always maintained that I am part of the group of "non-sensitive personnel," meaning that none of the material I work with or any of the information I handle is relevant to national security matters and is freely transferable to the international scientific community in journal publications, meeting presentations and scientific discussions with colleagues worldwide.

11. There are individuals at JPL who have been designated as "public trust employees," because they handle matters that could impact the integrity of a spacecraft. I have not been given such a designation, nor have

any of the other JPL employees I seek to represent in this lawsuit.

12. I do not work on any areas of activity which involve the use of dangerous materials or equipment. I am not engaged in activities that could potentially cause any harm. All of the work I do is confined to creating computational data and mathematical modeling of that data, so it simply involves computers, pens, and paper. The data that I work with is data that my team actually creates as a model of a chemical reaction and turbulence. This data is in no way sensitive or confidential, and is within the public domain.

13. There are a small percentage of employees at JPL who do have security clearances. All of those employees work on sensitive Department of Defense contracts or sensitive NASA projects. I and the other employees I represent in this lawsuit are not involved with sensitive work. I do not work on classified documents or projects with any of those employees with security clearances. Employees who work on classified materials work with such materials in segregated locked areas of the laboratory. I have no access to the materials on which they work.

14. When I was hired at JPL, I was not told that I would have to allow JPL or any other agency access to personal and intimate information. Throughout almost three decades of employment at JPL, I worked under the same assumption that I would not have to disclose the intimate details of my private life. I have never been required to undergo any type of background investigation to maintain my position with JPL.

15. I have been told that if I do not fill out Form SF-85 and sign the attached waiver of privacy rights, I will

not be given a badge and will therefore be denied access to the laboratory. This directive has been sent in writing to my colleagues and me via email and repeatedly stated at internal JPL meetings conducted by personnel in charge of the new badging. If I am denied access to the laboratory, I will not be able to continue performing my job. This will result in my constructive termination from my employment at JPL.

16. If I am forced to leave my job with JPL, I will suffer irreparable harm because I will be deprived of my livelihood. Moreover, I will be deprived of access to my students, Postdocs, and computers, which are critical to my scientific research. At my age, it is not easy to find another comparable job. Moreover, I must stay in Pasadena because I have a son with a developmental disability who needs to stay in the area in order to receive care.

17. My forced departure from JPL would also have immediate negative impact on the research in which I work. I do research in unique areas of physics with unique databases that my team has created. If I were unable to continue my work, this line of research would cease to continue alltogether. Therefore, my departure would cause immediate irreparable harm to NASA and the national interest.

18. Our nation's space program would be further harmed by the implementation of this directive because talented scientists will be discouraged from applying for jobs at NASA if they face background checks and full-scale waiver of their privacy rights in order to work at JPL. If they have to give up so much access to their personal life, potential hirees will be worried that NASA will use some piece of their past or they would seek references asking whether they qualify for their job from

individuals with whom they may have had a quarrel in order to pressure them not to publish results that are at variance with the beliefs of NASA's top management. Thus, JPL will be deprived of talented scientists who will instead take jobs in universities or private industry.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States. Executed this 7 day of August, 2007 in Pasadena, California.

/s/ JOSETTE BELLAN
JOSETTE BELLAN

DECLARATION OF ROBERT M. NELSON

I, Robert M. Nelson, hereby declare:

1. I am currently employed by California Institute of Technology as a Senior Research Scientist at NASA's Jet Propulsion Laboratory and am a plaintiff in the above-encaptioned action. I offer this declaration in support of the motion for preliminary injunction filed by the plaintiffs. I have personal knowledge of the information set forth herein and if called as a witness, I would testify to the truth and accuracy of the following:

2. I received a BS degree from the City College of New York with a major in physics and minors in mathematics and education. I received a masters degree in astronomy from Connecticut Wesleyan University and a doctorate in planetary sciences from the University of Pittsburgh.

3. Upon receipt of my doctorate in 1978, I was awarded a National Academy of Sciences Resident Research Associateship at JPL. In 1980, I was hired as a research scientist at JPL where I have been employed continuously ever since. I advanced through the JPL job classification family to the rank of Principal Scientist, the highest non-management rank for a researcher. In 2000, I was given the additional title of Senior Research Scientist, a title reserved for approximately 80 members of the JPL research community who are judged by an outside peer review process to have exhibited a productivity level comparable to that of a full professor at a world class university. In 2005 the Senior Research Scientist Community at JPL elected me to the Senior Research Scientist Council. This group of nine scientists represents the interests of the research com-

munity at JPL to the JPL Chief Scientist and to the Director of JPL.

4. In 1980, I was selected by a NASA peer review panel to lead a Principal Investigator study on the International Ultraviolet Explorer Spacecraft, a precursor to the Hubble Space telescope. Subsequently, NASA peer review panels selected my proposal as a Principal Investigator for the Voyager mission data analysis programs of Uranus and Neptune. I have been continuously funded as a Principal Investigator in NASA's Planetary Geology and Geophysics Program for 20 years.

5. I was the Experiment Representative for the Voyager Mission Photopolarimeter instrument and was later named by the NASA Associate Administrator as a Co-investigator on the Voyager Mission. In 1990, I was selected by NASA to be a member of the Cassini Saturn Orbiter Visual and Infrared Mapping Spectrometer Team. That investigation has continued to the present.

6. In 1996, I was selected to be the Project Scientist of NASA's Deep Space 1 Mission, and I led the Deep Space 1 NASA selected science Team. Deep Space 1 was NASA's first mission to fly past a comet and return images to the earth. At the end of the DS1 mission I was appointed as Program Scientist for NASA's New Millennium Program, a program that oversees the introduction of new technology for application in deep space by NASA missions.

7. Outside JPL I have served as the Press Officer and later as Chairman of the largest division of the American Astronomical Society—it's Division for Planetary Sciences. I have served on the editorial Advisory Board of Icarus—the International Journal of Solar System Studies. In addition to numerous publications of

research results in the peer reviewed scientific literature, I have authored many review articles and encyclopedia articles on topics involving the spectrophotometric properties of planets, asteroids and planetary satellites and have served on the editorial board of the Encyclopedia of Planetary Sciences. In 1999 my review article on the planet Mercury appeared as the cover story article in Scientific American. The Mercury article was later re-published by Scientific American in a special edition of its most significant space science articles of the last decade.

8. I am a member of the American Astronomical Society, the American Geophysical Union, the European Geosciences Union, the Asia-Oceania Geosciences Society, the International Astronomical Union and COSPAR—the Committee on Space Research of the International Commission of Scientific Unions. I have received numerous NASA related citations and awards including a NASA Exceptional Service Medal.

9. My current title is Senior Research Scientist. There are approximately 80 other senior research scientists employed at JPL. I am currently the program scientist for NASA's New Millennium Program, which is the program that tests or validates all new technology that NASA uses in space. I have held this position for four years and it is a continuing appointment. Simultaneously, I am a principal investigator in NASA's planetary geology and geophysics program and also a team member of NASA's Cassini Mission, which is currently in orbit around Saturn.

10. During my entire career at JPL, I have never been required to have a security clearance, nor have I ever worked with classified materials of any type. I am

told that I have been designated as a group known as "non-sensitive personnel," meaning that none of the material I work with or any of the information I handle is relevant to national security matters and is freely transferable to the international scientific community. I am free publish my findings in scientific journals and to discuss my work with my colleagues both within and outside of JPL and I regularly attend scientific meetings around the world where I present research results to colleagues the only restriction being internal peer review by a management colleague.

11. There are individuals at JPL who have been designated as "public trust employees," because they handle matters that could impact the integrity of our spacecraft. I have not been given such a designation, nor have the other research scientists who I seek to represent in this lawsuit.

12. The three areas of activity on which I work do not involve the use of dangerous materials or procedures which could cause any significant damage. There are a very few limited projects for which physical or chemicals procedures or processes are used which could cause danger or damage within or outside of JPL. The number of employees who work with those materials or procedures is very limited.

13. While there are a small percentage of employees at JPL who do have security clearances, I do not work on classified material with any of those employees, they work on the classified material in segregated locked areas and I have no access to the materials on which they work. I have never been required to undergo any type of background investigation to maintain my position with JPL other than a "National Agency Check," which

required that I provide only my name, social security number and current address. It was my understanding that this information was used to check for outstanding warrants, arrests or convictions. There was no requirement that I sign a waiver of my privacy rights.

14. I have been told that if I do not fill out Form Sf85 and sign the attached waiver of privacy rights that I will not be given a badge and will therefore be denied access to the lab. If I am denied access to the lab, I will not be able to continue to perform my job. This will result in my constructive termination from my employment, since I will no longer be able to work. I have seen this directive sent in written form to my self and my colleagues as well. Attached hereto as Exhibit S is a true and correct copy of such a directive dated June 11, 2007.

15. If I am forced to leave my job with JPL, I will suffer irreparable harm in that I will be deprived of my livelihood and a laboratory which is critical to my scientific investigation. I will also be deprived of access to computer systems which have already installed software which is vital to the research for which I am funded by NASA: the Cassini Program and the planetary geology and geophysics program.

16. Because my scientific investigations have been reviewed regularly by NASA peer review panels comprised of scientists in the United States and abroad doing comparable work and adjudged to have a unique contribution to make in fulfilling NASA's goals and objectives, my forced departure from JPL would have an immediate negative impact on the projects on which I work. Those projects would face increased costs and delays which threaten schedule completion, all of which

would have an immediate harm on NASA's space program and ultimately the public.

17. A further irreparable harm to our nation's space program would be suffered because talented scientists will be discouraged from applying to NASA if they face background checks and full-scale waiver of their privacy rights in order to work at JPL. JPL will be deprived of talented scientists who will refuse to work at JPL or resign their employment there and instead take jobs in academe or in private industry.

18. On 28 August 2007 I received information from a colleague alleging that faculty members of the California Institute of Technology have been exempted from the HSPD#12 badge process for access to JPL. I sent an inquiry to Dr. Charles Elachi the Director of JPL asking if this was true. On August 29, 2007 Dr. Elachi confirmed that this was true in cases where if the faculty member was not using JPL computers. I have appended this email correspondence to this document as exhibits T and U. Thus, HSPD12 implementation rules will permit access by Caltech to the JPL facility and intimate contact with the staff, without these faculty members being subjected to the procedures that are being imposed by Caltech on its JPL employees.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States. Executed this 29 day of August 2009 in Pasadena, California.

/s/ ROBERT M. NELSON
ROBERT M. NELSON

DECLARATION OF SUSAN PARADISE

I, Susan Paradise, hereby declare:

1. I have been employed at JPL over 22 years. I offer this declaration in support of the motion to enjoin institution of the new background check and waiver at JPL. I have personal knowledge of the information set forth herein and if I was called as a witness would testify to the truth and accuracy of the following.

2. I hold a Bachelor's degree from Purdue University in Mathematics and Computer Science, and a Master's degree in Mathematics from the University of Southern California. I was hired by JPL in 1985 and since then my work has primarily focused on efforts to understand earth's changing climatology. I began as a scientific programmer for a Space Shuttle scientific instrument called ATMOS (Atmospheric Trace Molecular Spectroscopy) measuring the global distribution of trace gases in the Earth's atmosphere. Under ATMOS, I worked with a team of scientists developing software to analyze the data from the instrument. I did not require a security clearance to undertake any of this work and was never told or led to believe that any of my work implicated national security concerns.

3. In 1993, I became a scientific programmer for the MISR (Multi-angle Imaging Spectro-Radiometer) Project, part of the Earth Observing System (EOS) Terra platform, and quickly became the Level 2 Cognizant Design Engineer for that project, i.e., lead science software developer. I led the design, development and testing of the ground data system (GDS) analysis of the MISR scientific products, including aerosol amount, composition, and distribution, and cloud cover, height

and motion. MISR launched in December, 1999. Again, this work did not require a security clearance and did not implicate national security concerns.

4. I was promoted to Project Element Manager in 2001 for the Tropospheric Emission Spectrometer (TES) Project, also part of EOS, the Aura platform. Under TES, I managed the design, development and testing of all TES GDS software. TES launched in July, 2004. Again, this work did not require a security clearance and did not implicate national security concerns.

5. In April, 2006, I returned to MISR to continue management of the Level 2 Aerosol/Surface Team, completing the GDS software development, and leading the scientific analysis of resulting data. In April 2007, I joined the AMAPS (Aerosol Measurement and Processing System) Project as well (part time), as a scientific programmer and analyst. AMAPS provides simple and automated access to and analysis of a variety of science data products, in an effort to simplify data access and analysis for the scientific community within and outside of JPL. Again, this work did not require a security clearance and did not implicate national security concerns.

6. I am a 2002 recipient of the NASA Exceptional Service Medal for my work on MISR, one of NASA's highest honors.

7. I love my job. I believe I am well respected as I have been repeatedly promoted and received numerous awards and bonuses. I thrive on the technical and managerial challenges, and have a passion for the larger scope of the work I do in contributing to the characterization of Earth's changing environment. I am committed to the understanding of man's role in climate change

and what we can do to mitigate its undesirable consequences.

8. I am not young, nor am I near retirement. I value my job and my security in my current position. I envisioned a full and fulfilling career at JPL, that is, until the recent re-badging process commenced.

9. Throughout my career, my work has been entirely in the Public Domain in that the results of the work of the teams I have been involved in public property. It is part of my job and those of my team members to make the data accessible to the public. I do not have and never have had access to sensitive information in the context of national security. Regardless, I do believe it is reasonable for the government, as provider of the facilities in which I work, to perform a reasonable and limited background check on me for the purpose of verifying my identity, as in the spirit of HSPD-12, the directive issued by the President. However, JPL's rebadging process goes far beyond the spirit of HSPD-12, giving the government access to virtually any information it chooses. I believe this is a violation of my Fourth Amendment right to privacy, in direct contrast with the HSPD directive. If I refuse to waive my rights, I will be fired. I must also sign a statement that I am giving up my rights voluntarily, which is not the case.

10. HSPD-12 states, "This directive shall be implemented in a manner consistent with the Constitution and applicable laws, including the Privacy Act (5 U.S.C. 552a) and other statutes protecting the rights of Americans." I am convinced that JPL's implementation of HSPD-12 is in violation of this statement.

11. Furthermore, it is my understanding that JPL intends to use the information gained from the back-

ground checks to determine "suitability" for employment, which is again beyond the scope of HSPD-12. I believe this to be the case because JPL has posted a "suitability matrix" which makes clear this is the intent and I verified that intent with the head of JPL, Dr. Charles Elachi, at a meeting with my division at which he answered questions. At that meeting I asked him how JPL will determine "suitability" for employment as a result of the background checks. Dr. Elachi responded that they will make use of the "suitability matrix" posted on JPL's website. "Sodomy" and "carnal knowledge" are included amongst the criteria listed in the suitability matrix under the heading "Criminal and Immoral Conduct" by which JPL will make its suitability determination and are in the category of conduct leading possible disbarment. This is in contrast to JPL's Nondiscrimination and Equal Employment Opportunity Policy (Doc #26752), which states, "The Laboratory is committed to equal opportunity for all persons without regard to . . . marital status, . . . sexual orientation, . . . " I consider the suitability matrix to be excessive and unreasonable. In a conversation I had with JPL Deputy Director General Tatini, he agreed that some of the criteria "includes all of us."

12. I am scared and I feel intimidated. I find myself faced with the choice of keeping a job and career that I love, or insisting on my Fourth Amendment right to privacy. I hold both dear and the choice is not easy. Either way, there is much at stake. What is my job worth to me? It is invaluable. It is not simply a dollar amount. It is the satisfaction of the job I do and its ultimate contribution to humanity. What does the Constitution mean to me? It is incalculable, and, decidedly worth fighting for.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States. Executed this 29th day of August 2007 in Pasadena, California.

/s/ SUSAN PARADISE
SUSAN PARADISE

DECLARATION OF RANDY J. ADEN

I, Randy J. Aden, declare as follows:

1. I submit this declaration in support of Caltech's opposition to Plaintiffs' Motion for Preliminary Injunction. If called upon to testify, I could and would testify to the following.

Background and Experience

2. I am employed by the California Institute of Technology at the Jet Propulsion Laboratory ("JPL"). I currently serve as the manager of JPL's Office of Protective Services ("OPS"), a position I have held since April 2006. From 1989 until the time I joined JPL, I was an agent for the Federal Bureau of Investigation ("FBI"). Prior to working for the FBI, I was an officer in the Simi Valley Police Department for 10 years. I have a Bachelor of Science in Criminal Justice from the University of Nebraska, and a Masters in Public Administration from California Lutheran University. I also have Top Secret security clearance.

3. In the course of my work for the FBI, I received six letters of commendation from the Director of the FBI, and six cash incentive awards. I was the Los Angeles office's nominee for the 2003 FBI Director's Annual Award for Special Achievement, and I received the 1999 Los Angeles United States Attorney's award for Outstanding Contributions to the Enforcement of Federal Law. During the course of my career with the FBI, I held many positions, the last of which was a Supervising Special Agent in the Los Angeles office's Joint Task Force on Terrorism.

What does JPL Do

4. JPL is an integral part of the nation's space program, and is responsible for some of the world's leading space exploration projects. Some of these projects include the Mars Explorer Rover Mission, the Cassini Mission to Saturn, and the Voyager Mission to Jupiter, Saturn and beyond. The Space Flight Operations Center for JPL missions is located on the JPL campus. In addition, from its campus, JPL manages the Deep Space Network, which is responsible for monitoring and communicating with numerous satellites and other space missions. JPL is also involved in other projects which require security clearances, and JPL employs many personnel who are required to have security clearances.

5. There are more than 7,500 individuals who may require physical access to JPL. The facilities JPL uses are owned by the Federal Government. JPL manages the facilities pursuant to a written contract with NASA.

6. Part of my job duties is to implement measures to provide for the safety of the individuals who work at JPL, and the physical facilities at JPL.

7. The physical JPL facilities are located on about 175 acres of federally-owned land in Pasadena and La Cañada Flintridge, California. Attached as Exhibit 1 is a true and correct copy of an aerial photograph of JPL's facilities, and attached as Exhibit 2 is a true and correct copy of a map depicting the layout of JPL.

8. The three main entrances to JPL are controlled by a single security gate at each entrance, where employees must show an identification badge to enter the premises. There are also turnstiles at several parking areas where employees must scan their badge in order

to enter. Once they pass through the security checkpoints, they have access to the entire facility. Although a higher security badge is necessary to actually enter the buildings where sensitive or classified work is conducted, anyone can walk right up to the buildings. Thus, anyone with unescorted access privileges to JPL has the physical ability to get very close to facilities where sensitive or classified work is conducted. It is therefore important that JPL understand who will have those unescorted privileges, even if those people will not have access inside the secured facilities themselves. While we have great faith and confidence in our employees, the potential nonetheless exists for someone with unescorted access to JPL to cause serious damage to the publicly funded missions of JPL.

History of HSPD-12

9. On August 27, 2004, the President of the United States issued Homeland Security Presidential Directive 12 ("HSPD-12"). The Department of Commerce then announced a standard for personal identity verification of federal employees and contractors which it published as FIPS Pub. 201-1. To ensure compliance with HSPD-12 and FIPS 201-1, NASA issued Procurement Information Circular 06-01, which sets forth the requirements for contractor personnel working at JPL and other NASA-related facilities to obtain security access badges.

The Badge Issuance Process

10. NASA created the processes (described more particularly below) required to obtain an access badge. The bulk of the process, however, is completed through the Federal government's Office of Personnel Manage-

ment ("OPM"). JPL has no control over: (1) the background investigation required to obtain a badge; or (2) whether or not an individual will be approved by the federal government to receive a badge.

11. Rather, the only role JPL has played and continues to play is the ministerial role of serving as the "sponsoring agency," which involves low-level supportive help to NASA in carrying out the new badge procedures NASA created (exact duties as "sponsoring agency" are discussed more fully below) because JPL is the only entity with knowledge of the identity of the employees who needed access to the facility.

12. Part of JPL's ministerial role involved notifying employees of the new badge procedures NASA was mandating. Accordingly, on February 22, 2007, Dr. Charles Elachi, JPL's Director, advised all JPL personnel that they would have to obtain a new identification badge, which would "require [] significant changes in the issuance of badges." A true and correct copy of Dr. Elachi's e-mail is attached as Exhibit 3. On March 28, 2007, Jerry Suitor, a JPL manager, sent an e-mail to all JPL personnel advising them of NASA's requirements for obtaining a new badge, including the need to complete a background investigation. A true and correct copy of Mr. Suitor's e-mail is attached as Exhibit 4. JPL also posted on its internal website a chart which provided an overview of the process. A true and correct print-out of the chart from the website is attached as Exhibit 5.

13. Before any applicant could apply for a badge, NASA also required JPL to make an initial determination about the "risk classification" appropriate for any particular job. As more particularly described in the declaration of Cozette Hart, NASA required JPL to de-

termine which jobs should be classified as having low, moderate, or high risk in accordance with the criteria NASA gave JPL since only JPL knew who required access to the facility. A very high percentage of those needing badges in order to access JPL's facilities have a risk classification of "low," which results in the least intrusive background check available. Each of the Plaintiffs in this case was classified as "low" risk.

14. Once risk classification was complete, new badge applicants were allowed to begin the process of applying for a badge with the federal government when they received an "initiation e-mail." These initiation e-mails are sent to applicants on a rolling basis from JPL's Office of Protective Services ("OPS") at NASA's request. The e-mails tell the applicant that he or she could then begin the new badge application process, and that the applicant has 10 days from receipt of the initiation e-mail to complete the government's required forms.

15. Badge applicants formally begin the application process on the federal government OPM's secure online system called "e-QIP." No applicant can preapply for clearance, and can only access the e-QIP website to start the application process when they have been invited to do so though an initiation e-mail.

16. The primary form applicants complete on e-QIP is Standard Form ("SF") 85. A copy of SF 85 is attached as Exhibit 1 to Plaintiff's Complaint. SF 85 is a standard form used by the federal government for employees who seek employment within the federal government. JPL did not create SF 85, and did not select SF 85 as the form to use for these purposes. Applicants complete SF 85 entirely through e-QIP by logging on to e-QIP and entering the requested information via their

computer. Thus, the applicants provide the responsive information directly to the federal government, and not to JPL.

17. SF 85 contains a five-page questionnaire, which asks 14 different questions. The first page contains questions asking for the applicant's name, gender, citizenship status, date and place of birth, social security number, and whether the applicant has used other names. On the second and third pages of the form, the applicants are asked to identify where they've lived and worked for the past five years, and where they went to school.

18. On page four of SF 85, the applicants are asked to list three people who know them well. In assisting applicants with completing SF 85, JPL has stated that applicants can comply with this question by listing three of their JPL co-workers, so long as the references haven't otherwise already been listed on the form. These references are then mailed a form request which asks for their yes/no responses to several questions.

19. On page 5 of SF 85, the applicants provide information about their selective service record and their military history. The last question asks whether the applicants have used, possessed, supplied or manufactured illegal drugs in the last year. This question specifically states that the applicants' truthful response to this question cannot be used as evidence in any criminal proceeding.

20. The last page of SF 85 is an Authorization for Release of Information ("Authorization"). The Authorization states that any information disclosed in response to the Authorization "is for official Use by the Federal Government only for the purposes provided in this Stan-

dard Form 85, and may be redisclosed by the Government only as authorized by law." JPL has specifically advised all of the potential applicants that the SF 85 Authorization does not allow the federal government to access an applicant' s medical records or personal financial records, and that the information Plaintiffs provide on SF 85 will not be distributed publicly.

21. JPL has maintained a web-site which provides answers for JPL personnel to answer frequently asked questions. On this website JPL has advised its personnel that the Authorization does not allow for the release of medical information or personal financial information.

22. SF 85 also advises the applicants that all information provided in response to the questionnaire will be protected from unauthorized disclosure and is governed by the Privacy Act. In the course of my work regarding the badge-issuance process, I have been informed by OPM that all information applicants provide through e-QIP will be maintained in a confidential and secure manner.

23. After the applicant completes SF 85, then a person in JPL's OPS department reviews the form and "approves" it. In this context, to "approve" the form simply means that someone has verified that the applicant provided all of the information requested in SF 85. The approvers do not disclose any information contained on the form to anyone else and no one at JPL takes any steps to investigate or confirm the accuracy of any of the information provided on SF 85. Currently, JPL has hired approximately 22 contractors—who have at least secret clearances and are approved by OPM—to fulfill the approver function. Once the approver has verified that the applicant has responded to all of the questions,

then the SF 85 is sent to the federal government's OPM for further processing.

24. After the approver has forwarded the SF 85 to OPM, JPL does not maintain any record of the data contained within SF 85. Because all of the data is entered electronically by the applicants, it is maintained in OPM's e-QIP program. While some of the approvers may print the SF 85's as part of their review process, once the forms have been approved, all hard copies of the SF 85 are shredded. JPL maintains no record of the SF 85 the applicants complete.

25. Once applicants fill out SF 85 and it is confirmed that the applicant has provided all of the requested information, the forms reside with the federal government's OPM. OPM and NASA then "adjudicate" the application, meaning that the federal government does a background check and decides whether or not to give the employee a badge. JPL plays no role and has no input in the adjudication process.

26. After NASA and OPM adjudicate an application, the individuals are notified by NASA if they did not pass. Those who do not pass can appeal the decision with NASA.

27. JPL plays no role in the appeal process, and is not advised of the reasons why an applicant is denied a badge.

The Status of the Badge Issuance Process at JPL

28. Since April, 2007, we have sent initiation e-mails to over 6,500 people. Of those, more than 4,100 have had their completed applications forwarded to OPM and NASA for adjudication. Over 57,000 individuals are subject to the new badge-issuance requirements at all

NASA facilities. As of August 31, 2007, over 46,000 individuals have applied for their badges across the country. I am not aware of any reports of the actual implementation of any of the types of improper investigative techniques Plaintiffs suggest might happen.

29. Three of the named plaintiffs are Julia Bell, Amy Hale, and Peter Shames. These three individuals have already provided the information requested in SF 85, to the government through OPM's e-QIP program.

30. I have read in some of plaintiffs' moving papers concerns about whether Caltech faculty members who might visit the JPL facility will be treated differently than JPL employees. This is not the case. Anyone who requires, or desires, unescorted access privileges to JPL must apply for and receive a badge from NASA. This includes faculty at Caltech.

Some Plaintiffs Had Security Clearances

31. I have read in plaintiffs' moving papers that certain of them have held security clearances in the past. Those individuals are Susan Foster, Dennis Byrnes, James Kulleck, Celeste Satter, Paul Weissman, and Amanda Mainzer. Based on my own personal experience, as well as being responsible for security at JPL, I know that these individuals underwent a far more extensive background check than what is being asked of them here in order to obtain a security clearance of the type Plaintiffs previously obtained. For example, in order to obtain a secret security clearance, these plaintiffs disclosed to the government more than ten years of residential history (instead of the 5 years requested in SF 85), more than ten years of employment history (instead of the five years requested in SF 85), information

regarding their family members (none of which is asked for in SF 85), and details about their travels outside the United States (which is also not asked for in SF 85). Today, in order to receive a security clearance, an applicant would complete, at a minimum, an SF 85P form, or an SF 86. Attached as Exhibit 6 is a chart summarizing the differences among SF 85, SF 85P, and SF 86.

32. Nineteen of the 28 plaintiffs were previously issued an identification badge known as the "OneNASA" badge. One of the requirements to receive a OneNASA badge was for the applicant to provide his or her fingerprints.

I declare under penalty of perjury under the laws of the United States of America that this declaration is true and correct and that I signed this declaration on the date listed below in Pasadena, California.

Executed this 21st day of September 2007 in Pasadena, California.

/s/ RANDY J. ADEN
RANDY J. ADEN

DECLARATION OF CITA M. FURLANI

I, Cita M. Furlani, declare as follows:

1. My name is Cita M. Furlani. I am the Director of the Information Technology Laboratory ("ITL") at the Department of Commerce's ("DOC") National Institute of Standards and Technology ("NIST"). I have served in this position since February 19, 2006.

2. Before assuming my current duties, I was NIST's Chief Information Officer and advised the NIST Director on the planning, execution, evaluation and delivery of information technology services and support since June 2003.

3. From October 2002 to June 2003, I served as Director of the Information Technology and Electronics Office within NIST's Advanced Technology Program ("ATP").

4. In October 2000, I was detailed by the NIST Director to serve as Director of the National Coordination Office for Information Technology Research and Development, which reported to the White House. I remained in that position until October 2002.

5. From October 1996 to October 2000, I served as Director of the Information Technology and Applications Office within NIST's Advanced Technology Program. This assignment included service as Acting Director of ATP.

6. Prior to ATP, I served in several other key roles at NIST, including Chief, Office of Enterprise Integration (April 1994 to July 1996); Senior Program Analyst, NIST Program Office (August 1992 to April 1994) and

Group Leader and scientist within the Manufacturing Engineering Laboratory (July 1981 to August 1992).

7. I earned a B.A. in Physics and Mathematics from Texas Christian University in 1960 and a Master of Science degree in Electronics and Computer engineering from George Mason University in 1986.

8. In my position as Director of ITL, I supervise the NIST Computer Security Division ("CSD"). CSD prepared the drafts of FIPS PUB 201 and FIPS PUB 201-1, which NIST recommended for promulgation by the Secretary of Commerce.

9. HSPD-12, issued by the President on August 27, 2004, required DOC to "promulgate in accordance with applicable law a Federal standard for secure and reliable forms of identification (the 'Standard') not later than 6 months after the date of this directive in consultation with the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of the Office of Management and Budget (OMB), and the Director of the Office of Science and Technology Policy." The Secretary of Commerce responded to this Directive by issuing FIPS PUB 201 in February of 2005 and a revision, FIPS PUB 201-1, in March of 2006.

10. Section 3 of HSPD-12 required the Secretary to incorporate "secure and reliable forms of identification" in its standard and defined that term as "identification that (a) is issued based on sound criteria for verifying an individual employee's identity; (b) is strongly resistant to identity fraud, tampering, counterfeiting, and terrorist exploitation; (c) can be rapidly authenticated electronically; and (d) is issued only by providers whose reli-

ability has been established by an official accreditation process."

11. In the process of developing FIPS PUB 201-1, NIST concluded that the prevalence of fraudulent identity credentials in the United States necessitated some form of background check to verify the identity of prospective recipients of the identity credentials.

12. FIPS PUB 201-1 specifies that the National Agency Check with Written Inquiries ("NACI") or other Office of Personnel Management ("OPM") or national Security community investigation required for Federal employment be initiated prior to the issuance of a credential.[1] Subject to very limited exceptions, the NACI has been, and remains, the minimum level of background investigation required for federal employees since the President promulgated Executive Order 10450 in April 1953. NIST, in consultation with OPM and other federal agencies, determined that a successfully adjudicated NACI could be used to meet the requirements established in HSPD-12.

13. The NACI begins with the completion of a Standard Form ("SF") 85, 85P, or 86. The NACI has two components: the National Agency Check ("NAC") and the written Inquiries. Standard NACs are a check of four government databases: (1) the Security/Suitability Investigations Index; (2) the Defense Clearance and Investigation Index; (3) the FBI Name Check; and (4)

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[1] Although FIPS PUB 201-1 refers to the National Agency Check ("NAC") in Section 2.3, this reference was a remnant of an earlier draft of the document that was erroneously included in the final draft. As correctly stated in Section 2.2, the NACI is the minimum background investigation required under FIPS PUB 201-1 for federal employees and contractors.

the FBI National Criminal History Fingerprint Check. The Inquiries portion of the NACI consists of a set of written inquiries sent to the employers, educational institutions, residences, and references listed by the individual in the Standard Form, as well as to law enforcement agencies.

14. NIST determined that the "NAC" portion of the NACI was alone insufficient to accomplish the security objectives of HSPD-12. More specifically, NIST determined that the four database checks that comprise the NAC would detect only individuals whose fingerprints are on file at the FBI or individuals for whom there is a known history with law enforcement or other government agencies. NIST concluded that the written inquires were necessary to establish a history with an individual by verifying the employment, educational, and residential information provided by the individual in the SF 85, and by confirming the person's trustworthiness and compliance with the law. If the written Inquiries reveal that false information was entered on the Standard Form, the individual who signed the falsified form may be subject to a perjury charge. NIST therefore concluded that the combination of such a disincentive to providing false information and a procedure whereby the government attempts to verify the correctness of the information entered onto the form substantially improves the probability of detecting individuals claiming a false identity.

15. Section 1.2 of FIPS PUB 201-1 notes that Federal departments and agencies will determine the level of security and authentication mechanisms appropriate for their applications. Thus, FIPS PUB 201-1 estab-

lishes minimum requirements and individual agencies may choose to exceed those requirements.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 2007.

/s/ CITA M. FURLANI
CITA M. FURLANI

DECLARATION OF CLINTON G. HERBERT

I, Clinton G. Herbert, declare as follows:

1. My name is Clinton G. Herbert. My current position with the National Aeronautics and Space Administration ("NASA") is Deputy Assistant Administrator for Security and Program Protection. In this position I am the second most senior individual responsible for security, law enforcement, counter-intelligence/counter-terrorism, and emergency preparedness at NASA. I have served in this position since April 2004.

2. I have been with NASA for eleven years, and my prior assignments include duty as Manager, Special Projects, Office of Security Program Protection, NASA Headquarters and as Chief of Protective Services at NASA's Ames Research Center in Northern California.

3. I am a 1988 graduate of Columbia College and have attended numerous professional training courses and educational forums throughout my career.

4. As part of my duties as Deputy Assistant Administrator, it was my responsibility to oversee the agency's implementation of all aspects of HSPD-12, including ensuring compliance with NASA Procedural Requirements ("NPR") 1600.1. *See* NPR 1600.1, attached as Ex. A. I developed NASA's policies and plans to reduce security vulnerability, including conducting required position risk designations throughout NASA. In my duties, I am in constant communication with security personnel at NASA Headquarters, all NASA Centers, and at other Federal agencies.

NASA's Contractor Workforce

5. NASA maintains a large, essential, and integrated contractor workforce, many of whom work on NASA property and use NASA equipment and resources. NASA maintains nearly 60,000 contractor employees and 20,000 civil service employees. Relevant distinctions between contractor and civil service employees are, as a practical matter, non-existent. At all levels, NASA contractor and civil service employees perform functionally equivalent duties. NASA therefore provides its contractors access to NASA physical and logical (i.e., information technology) facilities based not on their status as employees or contractors but on the jobs they perform.

NASA's Jet Propulsion Laboratory

6. NASA's Jet Propulsion Laboratory ("JPL") is the lead Center for NASA's prestigious deep space robotics and deep space communications missions. The technologies and science involved in these colossal endeavors require broad access to many NASA physical and logical facilities. For example, JPL robotics projects must be compatible with NASA launch vehicles and with flight telemetry capabilities. The compatibility requirement entails extensive and detailed parallel planning, research, and development, often spanning years, scores of persons, and hundreds of millions of taxpayer dollars. Without the proper physical and logical access for collaboration, coordination, and development, NASA and JPL missions would be hampered, if not effectively precluded.

7. JPL conducts its mission support activities—IT Security, telecommunications, IT network administration, physical security, emergency preparedness, asset and property management, export control and Interna-

tional Traffic in Arms Regulations records management, and public affairs—in the same manner as the other nine NASA Centers.

8. JPL is a NASA facility operated by the California Institute of Technology ("Caltech"). In contrast to the other nine NASA centers, all positions at JPL are filled by contractor employees. The Director of JPL is the only contractor out of the ten NASA Center Directors. Center Directors, including the Director of JPL, are responsible directly to the NASA Administrator for executing assigned missions and tasks for their NASA Centers.

NASA's Development of Security Requirements for Contractors

9. NASA, like all other federal agencies, has been conducting risk/sensitivity determinations (i.e., Low, Moderate, High) and appropriate background investigations on its civil servant workforce as required under Executive Order 10450 (April 1953) and its implementing regulations, 5 C.F.R. §§ 731-32. Under EO 10450, the National Agency Check with Written Inquiries ("NACI") is, subject to very limited exceptions, the minimum background investigation required for all federal employees and, more specifically, is the investigation required for employees in "low risk" positions.

10. The history and background for the decision to require at a minimum a NACI for NASA contractor employees dates back to the 2000 to 2001 timeframe. By that time, it had become apparent that some NASA installations were not conducting even the most rudimentary background checks of their contractor employees. NASA contractors, however, perform the majority of NASA's work, and they work alongside their civil ser-

vice counterparts at all risk levels. The Office of Security and Program Protection therefore determined that the incomplete screening of contractor employees posed a security vulnerability for the agency. This determination was subsequently validated by the NASA Office of Inspector General during an assessment of the agency's background investigation process.

11. To address this and other security policy and procedure shortfalls, NASA began the process of revising NPR 1600.1, the Security Program Procedural Requirements, in October 2001. Upon completion of the revision, the draft NPR passed through the agency's internal review and comment process whereby the mission directorates and mission support offices of all affected centers, including JPL, were afforded the opportunity to comment on the proposed procedural requirements.

12. Under its revised procedures for contractors, NASA was required to (1) conduct a risk/sensitivity level determination for each NASA contractor, (2) conduct a background investigation of each NASA contractor at a level commensurate with the results of the contractor's risk/sensitivity level determination, and (3) make a "reliability" determination for each contractor based on the results of the investigation.

13. These revised security procedures for contractors mirror the established security requirements for NASA's civil servant workforce. The risk/sensitivity level determination for contractors is identical to the risk/sensitivity level determination made for NASA's civil servant workforce. Similarly, the minimum background investigation for contractors is the NACI which, subject to very limited exceptions, is the minimum back-

ground investigation long required for federal employees under EO 10450. Finally, NASA's contractor "reliability" determination is based on the same criteria long applied to civil service "suitability" determinations.

14. NPR 1600.1 extended to contractor employees the same requirements for risk and sensitivity determinations, background investigations, and reliability determinations that have long existed for employees. NASA contractors at all risk levels perform equivalent functions to those performed by NASA's civil servant workforce. Based on this equivalence, NASA determined that the same investigation should be conducted and the same evaluative criteria should be applied. As an administrative matter, the criteria were well-established and adjudicators well-trained in their application.

15. The NPR update was approved and published in November 2004 and took effect immediately. Each contractor working in a NASA Center or requiring remote access to NASA IT resources was, as of that date, required to submit to a background investigation. NASA has approximately 60,000 contractors located on NASA property or installations, and approximately 39,000 of these contractors have completed the requisite investigation.

16. NPR 1600.1 was updated and published on November 8, 2005, to incorporate HSPD-12 and FIPS PUB 201 as additional authority. Because NPR 1600.1 had, prior to HSPD-12, already established the NACI as the minimum background investigation required for all contractors, HSPD-12 did not prompt NASA's NACI requirement. Absent HSPD-12, NASA's NACI requirement for both employees and contractors would remain.

17. Prior to HSPD-12 and FIPS PUB 201 and 201-1, NASA had not yet incorporated the background investigation requirement of NPR 1600.1 into the terms of NASA/Caltech contract; however, NASA's contract with Cal Tech now includes a term requiring adherence to NASA's application of HSPD-12 and FIPS PUB 201-1. *See* Amendments to NASA/Caltech Contract, attached as Ex. B.

Background Investigation Process

18. NASA initiates the necessary background investigation for its employees and contractors. NASA collects data sufficient to commence the appropriate level background investigation, in the form of a completed SF 85 or SF 86. NASA submits the forms electronically to the U.S. Office of Personnel Management ("OPM") for investigation. NASA itself does not conduct the investigations.

19. OPM conducts the investigation and returns the results to NASA. NASA determines whether the information revealed in the investigation should result in a denial of access, further investigation to refute or substantiate the information, or a grant of access. NASA's goal is to evaluate the individual's trustworthiness, judgment, and overall compliance with the law. These criteria are relevant in determining whether an individual is sufficiently reliable such that granting him or her access to federal facilities, information technology resources, and government proprietary information will not compromise the security of the federal government.

20. The Privacy Act and other privacy regulations ensure the confidentiality of any information collected during this process.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 2007.

/s/ CLINTON HERBERT
CLINTON G. HERBERT

DECLARATION OF RILEY DUREN

I, Riley Duren, hereby declare:

1. I am currently employed by California Institute of Technology as a Principle Systems Engineer at NASA's Jet Propulsion Laboratory and am a plaintiff in the above-encaptioned action. I offer this declaration in support of the motion for preliminary injunction filed by the plaintiffs. I have personal knowledge of the information set forth herein and if called as a witness, I would testify to the truth and accuracy of the following:

2. The following declaration is offered in response to the Defendant's claims that "the balance of hardships weighs against issuance of preliminary relief". The following inconsistencies are offered not to undermine the authority of the NASA administrator but rather to point out that granting the requested injunctive relief poses minimal risk to the government and that in fact, the current HSPD-12 implementation fails to acknowledge the relatively unrestricted access many vendors and individuals have to the JPL facility.

3. As an extension of Caltech, JPL is a unique combination of academia and government. JPL has always operated more as a university campus type environment than as a high-security government facility and continues to do so to this day. Inherent to that paradigm is the fact that NASA operates JPL in an open manner, encouraging numerous visitors, students, and visiting scientists, often foreign nationals. While JPL does require badges for permanent employees, as described in the declaration of Susan Foster, JPL has instituted limited physical security precautions. For example, there are no metal detectors, no inspection of handbags, and

vehicle inspections are cursory and for cars, only conducted randomly.

4. The following description refers to the JPL map submitted in the Declaration of Mr. Randy J. Aden. Motorists approaching the Southwest quadrant of JPL must first pass through a checkpoint on Oak Grove drive. The main purpose of this checkpoint is to offer a quick pre-screening of vehicles before entering the lab property. Passenger cars are waved through (including badge-less visitors who are directed to a visitor's parking lot). Trucks and busses receive a cursory inspection in which the guard takes a quick peek inside. No detailed search such as examining the undercarriage is performed. Trucks delivering equipment, chemicals, etc are then directed to a gate where they are waved through and told to park just past the guard shack. The drivers typically stand in line at the guard shack to have their paperwork processed and identity verified (presumably via driver's license) while their (often large) vehicles are parked within 50 feet of the Spacecraft Assembly facility. The drivers are then allowed to drive around the lab ("right up to buildings"—a privilege limited to < 30% of permanently badged employees) without submitting to any form of background investigation.

5. Another indication of the openness of the JPL campus relates to the treatment of temporary visitors. In order for a visitor to gain access to the lab they must have a sponsoring JPL employee submit a request to Security with approval by the employee's supervisor. The employee (or designee) is then required to meet the visitor at the visitor center where they sign in with a secretary and then escort them on the lab—without going through a guard gate or undergoing any sort of

search of their person, bags, etc. The JPL employee is required to escort the visitor but has no training in security methods, identification, etc. In many cases, these visits are first-time meetings with a prospective partner or vendor (no past history).

6. A final example of JPL's openness is seen in its handling of part-time or temporary employees. All JPL employees with non-escorted badges are able to enter the lab through these gates. However, not all employee badges are created equal. Only permanent JPL/Caltech and contractor employees will undergo the NAC-I background investigation. Many other personnel including students and others who work part-time or only on lab several months per year, are only required to submit to a NAC check before being granted unescorted access to the lab including computer access. This includes foreign nationals.

7. Once a year, JPL opens its doors for an entire weekend to all members of the public in a widely advertised free event. In the past few years, tens of thousands of visitors have had unrestricted access to the lab on these open house weekends. None of these visitors are required to show identification nor are they issued badges. To my knowledge, there are no metal detectors and vehicle and bag checks are limited to cursory and random checks.

8. In all of these situations, the government is already accepting that it allows access to the lab by many individuals who do not undergo the same level of background check as the lower-risk long-term employees. Therefore, the presence or absence of the HSPD-12 badge is largely irrelevant to the overall risk posture for the lab.

9. As for the safety of JPL spacecraft during operations, the issuance of an HSPD-12 badge will add little or nothing to existing checks and balances which have been in place at NASA for years. The scientific exploration of deep-space with robotic spacecraft is an inherently difficult and complex endeavor. Missions are executed at great distances from earth, in extreme, poorly characterized environments, and typically require first-of-a-kind technology to implement them. These missions are on the cutting edge of human capability and there is little margin for error. Confusion over navigation angles as small as a millionth of a degree can result in a spacecraft landing in hazardous terrain on Mars or missing the planet entirely. Failing to correctly set the focus of a telescope during ground testing can result in severely distorted images in space. Software bugs can lead to an onboard computer rebooting or responding incorrectly during a critical period—with no direct or timely way for earth-based operators to intervene.

10. JPL's experience dealing with these unique technical challenges over many decades has led to a formal set of Flight Project Practices which govern every aspect of a mission's design, development, test, and operations. While voluminous in content, these Practices are based on one central tenant: *all critical activities must be peer-reviewed and independently validated*. A short list of examples of how this tenant is implemented:

- All hardware components and software programs must pass a series of formal design reviews at key "gates" throughout the development of a program
- All software is verified by independent testers before use in flight

- Personnel working on or around flight hardware must follow the "buddy system" to ensure there is always a minimum of two sets of eyes (and brains) involved
- All spacecraft undergo a final "Walkdown" Inspection at the launch pad to ensure there are no problems before liftoff. The walkdown team is composed of project personnel and independent (non-advocate) experts trained to look for problems.
- Before any command is sent to a spacecraft in flight it must pass the following gauntlet to ensure it is correct and safe:
    - manual checking by more than one person (per checklist/procedure)
    - dress-rehearsal on a testbed (spacecraft simulator)
    - automated constraint checking by ground software
    - automated constraint checking by spacecraft flight software
- All spacecraft maneuvers (including detailed trajectory calculations) must be peer-reviewed by a set of independent, non-advocate peers before execution
- Key science decisions such as Mars landing site selection undergo a series of peer-reviews by the science team, engineering team, and NASA management

11. These and other Flight Project Practices are formally levied on every mission JPL implements and each mission is required to demonstrate compliance with them (otherwise NASA will not authorize launch). JPL's Flight Project Practices are considered so effective and thorough that they have strongly influenced the NASA-wide processes for Systems Engineering and Mission Assurance. They have also resulted in a Project Manager's Training Course that has been offered annually by JPL for several years and has been well attended by personnel from NASA centers and other federal agencies, including the Department of Defense.

12. In addition to the Flight Project Practices, every JPL spacecraft since the 1970's has included a unique capability known as Fault Protection which resides in the onboard computer. In the event of a serious failure, Fault Protection autonomously places the spacecraft in a safe-state and calls home for help. This capability is critical in missions for which direct and timely human interaction is impossible. JPL's experience with fault-protection in deep-space missions is: a) the capability is typically used once or twice a year during operations and b) 50% of these safing events are due to operator-error. This both underscores the need for rigorous Flight Project Practices as well as the success of the Fault Protection "safety net".

13. These practices are inherently rigorous and they work—as demonstrated by JPL's highly successful track record in deep-space exploration. JPL has been flying complex deep-space missions for over 50 years safely and successfully—without HSPD-12. The key point here is that **these measures are necessary because the work we do is technically difficult, not because of**

security concerns. Nevertheless, these practices serve an effective dual purpose. Checks and balances minimize the risks of wrong-doing, intentional or otherwise.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 26th day of September 2007 in Pasadena, California.

/s/ RILEY M. DUREN
RILEY DUREN

DECLARATION OF SUSAN D.J. FOSTER

I, Susan D.J. Foster, hereby declare:

1. I am currently employed by the California Institute of Technology at the Jet Propulsion Laboratory as a Senior Technical Writer Specialist. The following information is offered in support of the motion for preliminary injunction filed by the plaintiffs. I have personal knowledge of the information set forth herein and if called as a witness, I would testify to the truth and accuracy of the following.

2. I first became aware of the existence of a list of criteria for passing the Office of Personnel Management (OPM) SF85-related investigation on June 26, 2007, when an audience member asked the following questions at an open meeting at JPL on HSPD12 implementation: "OPM requirements are very vague. What is the scope of the investigation? What are the criteria for passing or failing the investigation?" JPL Director Charles Elachi, who was leading the meeting, deferred to Randy Aden, manager for the Office of Protective Services, who replied to the effect, "I have the criteria but I cannot show them to you."

3. In at least two open meetings held in July, concerned employees again asked to see the criteria against which our "suitability" to work at JPL would be judged. At one of those meetings, Charles Elachi waved several sheets of paper in the air, indicating that the pages in his hand were the suitability matrix. He stated that they did not contain anything we had not heard about in the JPL Ethics class. Charles Elachi further suggested we didn't need to worry about the matrix since we would have already been fired if we had done any of the things

listed in the matrix, which he said included things like running a house of ill repute.

4. Concerned employees, including myself, continued to press at the open meetings in July for access to the investigation criteria document. On or about August 2, a document titled "Issue Characterization Chart" was posted under the file name "Suitability Matrix.pdf" on the JPL internal HSPD12 website at http://hspd12.jpl.nasa.gov/RelatedDocuments/PDFs/Suitability_Matrix.pdf> It remained posted to that site until September 11, 2007. A copy of that matrix was filed as Exhibit R to the Penanen Declaration in support of the original motion for preliminary injunction. Attached hereto as Exhibit B is a set of "screen shots" from the "Related Documents" portion of the JPL official HSPD website, showing that the suitability matrix was posted from August 2, 2007 until September 11, 2007.

5. As a 39-year JPL employee, I am aware of many of the access restrictions in place to protect the JPL facility, including badge requirements and security checks at points of entry to the facility as well as to restricted areas within the facility.

6. Every person entering the facility must wear a badge appropriate for his or her employment status. There are three types of photo badges for regular JPL employees (described below). All three of these badge types have a picture of the employee, employee number, and a bar code. The employee must wear the badge at all times while on the JPL facility, in a visible location above the waist. Employees are instructed to challenge anyone they see who is not wearing a badge. There are

several different types of badges currently being used by JPL employees:

- The so-called "planet badge," which allows access to "unrestricted" JPL facilities and can be encoded to permit access to restricted JPL facilities. No fingerprints were required to obtain a planet badge.
- The so-called "One NASA badge," which was first issued in early 2006 in response to HSPD12. The One NASA badge allows access to all NASA centers. Employees must provide fingerprints to obtain a One NASA badge.
- A "temporary one-day" badge, which is printed by a security officer at the guard gate when an employee forgets to bring his or her badge to work or has been unable to locate his or her badge. This badge allows access to JPL facilities for one day only.

7. There are several other types of badges for individuals who are not JPL employees and who require long term access to the JPL facility.

8. Short-term visitors enter the JPL facility through the Visitor Control center where they are issued a temporary badge. Adults are required to show picture identification. The temporary badge does not include a photograph. All short-term visitors must wear the badge above the waist and must be escorted by a badged employee or affiliate at all times. This includes tour groups, friends, family and vendors. These visitors do not have to go through any type of metal detector or background check.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States. Executed this 26th day of September 2007 in Pasadena, California.

/s/ SUSAN D.J. FOSTER
SUSAN D.J. FOSTER

PETITIONER'S BRIEF

No. 09-530

In the Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Respondents are contract employees working at the Jet Propulsion Laboratory, a multi-billion-dollar federal research facility. Like all federal contract employees requiring long-term access to federally controlled facilities and information systems, they are required to undergo background checks. Respondents object to these background checks because, in their view, the government's use of standard forms to collect employment-related information about them would violate their constitutional right to informational privacy. The court of appeals agreed with respect to two inquiries on the standard background-check forms. The questions presented are:

1. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks in the course of a background investigation whether the employee has received counseling or treatment for illegal drug use that has occurred within the past year, and the employee's response is used only for employment purposes and is protected under the Privacy Act, 5 U.S.C. 552a.

2. Whether the government violates a federal contract employee's constitutional right to informational privacy when it asks the employee's designated references for any adverse information that may have a bearing on the employee's suitability for employment at a federal facility, the reference's response is used only for employment purposes, and the information obtained is protected under the Privacy Act, 5 U.S.C. 552a.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 17
Argument:
The government's collection of information through SF-85 and Form 42 for employment-related purposes is constitutional 20
A. This Court has made clear that constitutional privacy concerns are not triggered merely because the government collects information about an individual 21
B. This case involves only the routine collection of employment-related information by the government acting in its capacity as an employer and proprietor 26
1. This case concerns the government's collection of information, subject to the Privacy Act, not disclosure to the public 26
2. Any privacy interests implicated in this case are further limited because SF-85 and Form 42 seek information only for employment-related purposes 31
C. The use of SF-85 and Form 42 to conduct background checks of contract employees is constitutional 38
1. The government may ask contract employees who have used illegal drugs in the previous year whether they have sought treatment or counseling 38

Table of Contents—Continued: Page

2. The government may send Form 42 to a contract employee's designated references and contacts 44
D. The court of appeals' analysis ignored the *Whalen* and *Nixon* framework 47
Conclusion 57
Appendix 1a

TABLE OF AUTHORITIES

Cases:

AFGE v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997) 29, 43, 53, 54
Board of County Comm'rs v. *Umbehr*, 518 U.S. 668 (1996) 34
Cafeteria & Restaurant Workers Union, Local 473 v. *McElroy*, 367 U.S. 886 (1961) 33
Connick v. *Myers*, 461 U.S. 138 (1983) 33, 34
Crawford, In re, 194 F.3d 954 (9th Cir. 1999), cert. denied, 528 U.S. 1189 (2000) 15, 48, 50
Detroit Edison Co. v. *NLRB*, 440 U.S. 301 (1979) 28
Doe v. *Attorney Gen. of the United States*, 941 F.2d 780 (9th Cir. 1991) 15, 50
Doe v. *Chao*, 540 U.S. 614 (2004) 28
Eastwood v. *Department of Corr.*, 846 F.2d 627 (10th Cir. 1988) 40
Engquist v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146 (2008) 18, 33, 34, 43
Garcetti v. *Ceballos*, 547 U.S. 410 (2006) 34
Hoffa v. *United States*, 385 U.S. 293 (1966) 53

Cases—Continued: Page

Lane v. *Pena*, 518 U.S. 187 (1996) 15, 50
Lefkowitz v. *Turley*, 414 U.S. 70 (1973) 34
Mangels v. *Pena*, 789 F.2d 836 (10th Cir. 1986) 40
NTEU v. *United States Dep't of the Treasury*, 25 F.3d 237 (5th Cir. 1994) 29, 40, 43, 54
National Fed'n of Fed. Employees v. *Greenberg*, 983 F.2d 286 (D.C. Cir. 1993) 43
Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) ..... *passim*
O'Connor v. *Ortega*, 480 U.S. 709 (1987) 33
Paul v. *Davis*, 424 U.S. 693 (1976) 39, 44
Planned Parenthood v. *Danforth*, 428 U.S. 52 (1976) 25
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 41
Smith v. *Maryland*, 442 U.S. 735 (1979) 53
Thorne v. *City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984) 40
Tucson Woman's Clinic v. *Eden*, 379 F.3d 531 (9th Cir. 2004) 40
United States v. *Miller*, 425 U.S. 435 (1976) 14, 53
United States v. *Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980) 40
United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 24, 30, 53
Washington v. *Glucksberg*, 521 U.S. 702 (1997) 47, 48, 49, 52
Waters v. *Churchill*, 511 U.S. 661 (1994) 33
Whalen v. *Roe*, 429 U.S. 589 (1977) ..... *passim*

Constitution, statutes and regulations: Page

U.S. Const.:
Amend. IV 11, 12, 13, 14, 47, 53
Amend. V 2, 43
Due Process Clause 2, 39, 48, 52
Amend. XIV 48
Administrative Procedure Act, 5 U.S.C. 706(2)(C) 12
Federal Information Security Management Act of 2002, 40 U.S.C. 11331 ..... 8, 30
Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, §§ 601-602, 116 Stat. 2408 7
National Aeronautics and Space Act of 1958, 42 U.S.C. 2451 *et seq.*:
42 U.S.C. 2455 11
42 U.S.C. 2456 11
42 U.S.C. 2456a 11
42 U.S.C. 2473 11
Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 note 22
Privacy Act, 5 U.S.C. 552a 2, 6, 27
5 U.S.C. 552a(a)(3) 7
5 U.S.C. 552a(b) 7, 28
5 U.S.C. 552a(d)(1) 7
5 U.S.C. 552a(d)(1)-(2) 28
5 U.S.C. 552a(d)(2) 7
5 U.S.C. 552a(e) 7
5 U.S.C. 552a(e)(1) 7, 28, 32, 45
5 U.S.C. 552a(g)(1) 28
5 U.S.C. 552a(i)(1) 28

Statutes and regulations—Continued: Page

Rehabilitation Act of 1973, 29 U.S.C. 705(20)(C)(ii) 43
Rev. Stat. § 1753 (1875) (5 U.S.C. 3301) 3
5 U.S.C. 2302(b)(10) 55
15 U.S.C. 278g-3 30
44 U.S.C. 3543-3544 30
5 C.F.R.:
Section 731.101 36
Section 731.106 36
48 C.F.R. 52.204-9 30
Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 Comp.) 3, 35
Preamble, 3 C.F.R. 936 (1949-1953 Comp.) 3
§ 3(a), 3 C.F.R. 937 (1949-1953 Comp.) 3, 46
Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Comp.) 55
Exec. Order No. 13,087, 3 C.F.R. 191 (1998 Comp.) 55

Miscellaneous:

Paul William Barada & J. Michael McLaughlin, *Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business, and Your Family* (2004) 45
Gerald-Mark Breen & Jonathan Matusitz, *An Updated Examination of the Effects of Illegal Drug Use in the Workplace*, 19 J. Hum. Behavior in the Soc. Envt. (2009) 42
Philip D. Dickinson, *Hiring Smart: How to Conduct Background Checks* (1997) 35, 46
EEOC Compl. Man. (CCH) (Mar. 1995) 43

Miscellaneous—Continued: Page

38 Fed. Reg. 33,315 (1973) 43
71 Fed. Reg. 45,859-45,860 (2006) 30
75 Fed. Reg. 5359 (2010) 4, 6, 31, 32, 35, 45
Homeland Security Presidential Directive/ HSPD-12—Policy for a Common Identification Standard for Federal Employees and Contractors, Pub. Papers 1765 (2004) 8
Jet Propulsion Lab., NASA:
Jet Propulsion Laboratory Annual Report 08 (2009), www.jpl.nasa.gov/annualreport/2008-report.pdf 36
NASA Facts: Jet Propulsion Laboratory, www.jpl.nasa.gov/news/fact_sheets/jpl.pdf (last visited May 13, 2010) 10
Barbara A. Lee, *Who Are You? Fraudulent Credentials and Background Checks in Academe*, 32 J.C. & U.L. (2006) 35
Max Muller, *The Manager's Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, and Everything Else You Need to Know* (2009) 35
Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of All Departments and Agencies (Aug. 5, 2005) 9
Barry J. Nadell, *Sleuthing 101, Background Checks at the Law* (2004) 35

Miscellaneous—Continued: Page

National Inst. of Standards & Tech., U.S. Dep't of Commerce:

Archived Federal Information Processing Standards (FIPS) Publications (Feb. 25, 2010), http://csrc.nist.gov/publications/PubsFIPSArch.html 9

FIPS PUB 201-1, Personal Identity Verification (PIV) of Federal Employees and Contractors (Mar. 2006) 8

The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (2004) 8

OPM:

Federal Investigations Notice No. 10-05, Reminder to Agencies of the Standards for Issuing Identity Credentials Under HSPD-12 (May 17, 2010), http://www.opm.gov/investigate/fins/2010/fin10-05.pdf 55

Standard Form 85P, Questionnaire for Public Trust Positions (Sept. 1995), http://www.opm.gov/Forms/pdf_fill/sf85p.pdf 4

Standard Form 86, Questionnaire for National Security Positions (July 2008), http://www.opm.gov/Forms/pdf_fill/sf86.pdf 4

Society for Human Res. Mgmt., *Background Checking: Conducting Reference Background Checks* (Jan. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Documents/Background%20Check_Reference.pptx 34

In the Supreme Court of the United States

No. 09-530

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 530 F.3d 865. A prior opinion of the court of appeals (Pet. App. 30a-49a) is reported at 512 F.3d 1134. The order and opinions of the court of appeals on denial of rehearing en banc (Pet. App. 75a-130a) are reported at 568 F.3d 1028. The opinion of the district court (Pet. App. 54a-74a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 2008. A petition for rehearing was denied on June 4, 2009 (Pet. App. 75a-130a). On August 25, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including Octo-

ber 2, 2009. On September 23, 2009, Justice Kennedy further extended the time to and including November 1, 2009 (a Sunday). The petition was filed on November 2, 2009, and was granted on March 8, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any person be * * * deprived of life, liberty, or property, without due process of law." Pertinent portions of the Privacy Act, 5 U.S.C. 552a, are reproduced in the appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

The federal government, like any responsible employer, conducts basic background checks of its employees. These routine investigations allow the government to verify the identities and histories of the individuals it employs and ensure that they are trustworthy. For over fifty years, background checks have been required by Executive Order for all civil service employees. Federal contractors also have conducted background checks of their employees when required as a condition of their contracts with the government. In 2005, in the implementation of a Presidential directive, the Commerce Department formally required that background checks be conducted for all contract employees seeking long-term access to federal facilities and information systems.

Respondents are 28 federal contract employees working at the Jet Propulsion Laboratory (JPL), a multi-billion-dollar research and development facility

owned by the National Aeronautics and Space Administration (NASA). They contend that the government's collection of certain job-related information violates a constitutional right to informational privacy. The court of appeals concluded that respondents were likely correct and ordered the entry of a preliminary injunction. In so doing, the Ninth Circuit called into question the most basic reference checks that government employers nationwide conduct every day.

1. Since 1871, the President has been authorized by statute to designate persons to ascertain the fitness of candidates for federal civil service employment. Rev. Stat. § 1753 (1875) (5 U.S.C. 3301). Since 1953, the federal government has conducted background investigations for all federal civil service employees. See Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953 Comp.). The purpose of the investigation is to ensure that the applicant is "reliable, trustworthy, of good conduct and character," and "loyal[] to the United States." Preamble, *id.* at 936. The investigation must include "a national agency check * * * and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the persons under investigation." § 3(a), *id.* at 937. The investigation utilizes standardized forms and procedures in order to ensure that all persons seeking government employment "receive fair, impartial, and equitable treatment." Preamble, *id.* at 936.

The standard background check is called the National Agency Check with Inquiries (NACI). Pet. App. 3a-4a. The NACI begins after the completion of a questionnaire by the applicant. J.A. 217. Applicants for federal employment in non-sensitive positions complete

Standard Form 85, Questionnaire for Non-Sensitive Positions (SF-85). See J.A. 88-95 (blank SF-85).[1]

The applicant's responses on SF-85 are used to conduct the background investigation. J.A. 217-218. The first portion of the investigation—the "agency check"—consists of a check of records in four federal government databases. *Ibid.*; see Pet. App. 4a.[2] The second portion of the investigation—the "inquiries"—involves sending forms to employers, educational institutions, landlords, and references listed by the applicant on SF-85 to verify the information provided by the applicant. J.A. 217-218. One of the forms commonly used in that process is at issue here—Form 42, Investigative Request for Personal Information. Form 42 is sent to references, former landlords, and persons who can verify periods of self-employment and/or unemployment. See J.A. 96-97 (blank Form 42).[3]

a. SF-85 is a six-page form that seeks information relevant to whether the applicant is "suitable for the

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[1] Applicants for public trust positions and for national security positions complete forms that are like SF-85 but include more detailed questions. See OPM, *Standard Form 85P, Questionnaire for Public Trust Positions* (Sept. 1995), http://www.opm.gov/Forms/pdf_fill/sf85p.pdf (SF-85P); OPM, *Standard Form 86, Questionnaire for National Security Positions* (July 2008), http://www.opm.gov/Forms/pdf_fill/sf86.pdf (SF-86). Those forms are not at issue here.

[2] Those databases are the Security/Suitability Investigations Index, the Defense Clearance and Investigations Index, the FBI Name Check, and the FBI National Criminal History Fingerprint Check. J.A. 217-218.

[3] Similar forms are sent to educational institutions (Form 43) and former employers (Form 41) that the applicant identifies. See 75 Fed. Reg. 5359 (2010). In addition, record requests are made to record repositories (Form 40) and to law enforcement agencies (Form 44). See *ibid.* Those forms are not at issue here.

job." J.A. 88. The form requests basic biographical information such as where the applicant has lived, worked, and gone to school. J.A. 90-93. It also asks the applicant to provide contacts who can verify former residences, jobs, and schooling, and to provide the names of three persons who know the applicant well and can serve as references. J.A. 91-93. The form includes a few additional questions about Selective Service registration, military history, and drug use. J.A. 94. Finally, the form requests the applicant's authorization for the release of information, so that federal investigators may contact individuals listed on the form, verify the information provided, and inquire about the applicant's suitability for employment. J.A. 95.

As relevant here, SF-85 asks whether, in the past year, the applicant has "used, possessed, supplied, or manufactured illegal drugs." J.A. 94. If the applicant answers "yes," he or she is asked to "provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs[,] [i]nclud[ing] any treatment or counseling received." *Ibid.* The form advises the applicant that "[n]either your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding." *Ibid.*

SF-85 notifies the applicant that "[g]iving us the information we ask for is voluntary," J.A. 88, and that the government "will protect [the information provided] from unauthorized disclosure," J.A. 89. In particular, SF-85 advises the applicant that "[t]he collection, maintenance, and disclosure of background investigative information is governed by the Privacy Act." *Ibid.*

b. Form 42 is a two-page form sent to the persons identified by the applicant on SF-85 as references, former landlords, or persons who can verify periods of self-employment or unemployment. 75 Fed. Reg. 3559 (2010). Approximately 1,882,000 of these forms are sent out annually. *Ibid.* The Office of Personnel Management (OPM) estimates that the form takes five minutes to complete. *Ibid.*

Form 42 informs its recipient that it is seeking information relevant to the applicant's "suitability for employment or security clearance." J.A. 96. It first asks how long the recipient has known the applicant and how often the recipient associates or has associated with the applicant. J.A. 97. It then asks a series of yes/no questions, including whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness," *ibid.* (Item 6), or has "any adverse information about [the applicant's] employment, residence or activities" concerning "violations of the law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters," *ibid.* (Item 7). If the answer is "yes," Form 42 asks the recipient to "explain in Item 8." *Ibid.* In turn, Item 8 asks the recipient for "additional information which you feel may have a bearing on [the applicant's] suitability for government employment or a security clearance." *Ibid.* Item 8 provides a blank space and notes that "this space may be used for derogatory as well as positive information." *Ibid.* Form 42 concludes by asking whether the recipient would recommend the applicant for government employment or a security clearance. *Ibid.*

c. Form 42, like SF-85, states that the information it collects is protected by the Privacy Act, 5 U.S.C. 552a.

J.A. 89, 96. The Privacy Act permits a federal agency to collect and maintain in its records "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. 552a(e)(1).[4] The Act requires agencies to permit individuals to gain access to records that pertain to them, 5 U.S.C. 552a(d)(1), and to request amendments to their records, 5 U.S.C. 552a(d)(2). Subject to certain limited exceptions, the Act also prohibits agencies from disclosing any record about an individual maintained in a system of records without the written consent of that individual. 5 U.S.C. 552a(b).

2. The NACI background-check process that has long been used for federal civil service employees was recently made applicable to employees of federal contractors. Contract employees previously had been subject to background checks when provided for by contract. But in 2005, in response to a Presidential directive, the Department of Commerce formally required that background checks be conducted for all federal contract employees seeking long-term access to federal facilities or information systems.

a. Following the terrorist attacks of September 11, 2001, Congress created an independent, bipartisan commission to provide recommendations on how to prevent future attacks. See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, §§ 601-602, 116 Stat. 2408. In its final report, the Commission recommended that the federal government develop a uniform standard for the issuance of secure identification docu-

[4] Although this limitation applies to information "maintain[ed]" in a system of records, 5 U.S.C. 552a(e), the Privacy Act defines "maintain" to include "collect," 5 U.S.C. 552a(a)(3).

ments and then ensure that those documents are required for entry into vulnerable federal facilities. *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 390 (2004).

In response to that recommendation, the President directed the Department of Commerce to develop a mandatory and uniform "Federal standard for secure and reliable forms of identification." J.A. 127-130 (*Homeland Security Presidential Directive/HSPD-12—Policy for a Common Identification Standard for Federal Employees and Contractors*, Pub. Papers 1765 (2004) (*HSPD-12*)). In *HSPD-12*, the President recognized that there were "[w]ide variations in the quality and security" of the credentials used for access to federal facilities, and he decided that a new, uniform identification standard should be developed for all federal employees and contract employees. J.A. 127. The President determined that the uniform standard would "enhance security, increase Government efficiency, [and] reduce identity fraud," while protecting personal privacy. *Ibid.* The President charged the Office of Management and Budget (OMB) with ensuring compliance with the new standard. J.A. 128-129. The President also directed that the new standard be implemented consistent with the Privacy Act. J.A. 129.

b. In accordance with *HSPD-12*, and pursuant to its authority under the Federal Information Security Management Act of 2002, 40 U.S.C. 11331, the Department of Commerce developed a government-wide identity credentialing standard. J.A. 131-150 (National Inst. of Standards & Tech., U.S. Dep't of Commerce, *FIPS PUB 201-1, Personal Identity Verification (PIV) of Federal Employees and Contractors* at v (Mar. 2006) (*FIPS*

201-1)).[5] As relevant here, that standard requires that a NACI background check be completed as a condition for granting an individual long-term access to federal facilities or information systems. J.A. 144-145.[6] The NACI background-check process was selected because it is an established way to "confirm[] the person's trustworthiness and compliance with the law." J.A. 218; see J.A. 144-146.

The Commerce Department has taken affirmative steps to safeguard the privacy of information obtained during these background checks. *FIPS 201-1* directs agencies to implement the new credentialing system "in accordance with the spirit and letter of all privacy controls specified in this standard, as well as those specified in Federal privacy laws and policies," such as the Privacy Act, and it provides detailed requirements for agencies to follow to protect the information they receive. J.A. 147-150.

After the Commerce Department promulgated the new credentialing standard, OMB set an October 2007 deadline for federal agencies to begin the background-check process for all current employees and contract employees. J.A. 105-130 (Memorandum from Joshua B. Bolten, Director, OMB, to the Heads of All Departments and Agencies (Aug. 5, 2005)).

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[5] The Department of Commerce first released the government-wide standards in 2005 (*FIPS 201*); *FIPS 201* was incorporated into and superseded by *FIPS 201-1* in March 2006. See Nat'l Inst. of Standards & Tech., *Archived Federal Information Processing Standards (FIPS) Publications* (Feb. 25, 2010), http://csrc.nist.gov/publications/PubsFIPSArch.html.

[6] Although *FIPS 201-1* authorizes the use of either the NACI or a substantially similar alternative investigation approved by OPM, J.A. 144-145, NASA has not sought to utilize an alternative investigation.

3. JPL is a federal research and development facility owned by NASA. Pet. App. 3a. JPL is the leading NASA center for deep space robotics and communications missions, and it is renowned for its work in developing satellites, rockets, missiles, spacecraft, and telescopes. J.A. 206, 221; *NASA Facts: Jet Propulsion Laboratory* 1-2, 5-9, http://www.jpl.nasa.gov/news/fact_sheets/jpl.pdf (last visited May 13, 2010). The facility has been responsible for such projects as the Mars Explorer Rover Mission and the Cassini Mission to Saturn. J.A. 206.

JPL is operated by the California Institute of Technology (Caltech) pursuant to a long-running contract with NASA. Pet. App. 3a; J.A. 163. All positions at JPL are filled by contract employees, but JPL employees perform duties that are functionally equivalent to those performed by federal civil service employees at other NASA centers. Pet. App. 3a; J.A. 221-222. NASA therefore provides JPL employees with access to physical facilities and information technology systems similar to the access granted to their civil service counterparts. J.A. 221-222.

In 2001, even before *HSPD-12* was promulgated, NASA determined that it had a potential security vulnerability because contractors at some facilities were not carrying out any background checks of their employees. J.A. 222-223; see Pet. App. 5a. Accordingly, NASA began to revise its procedures, with the goal of imposing additional security requirements for its contractors' workers. J.A. 223. In 2005, NASA updated its agency-wide security policy to require that all contract employees undergo background checks before receiving identity credentials. Pet. App. 5a; J.A. 222, 224; see J.A. 154

(NASA Procedural Requirements: NPR 1600.1).[7] NASA decided that the background checks should be conducted using the NACI process, because that process has long been used for civil service employees, and "NASA contractors * * * perform equivalent functions to those performed by NASA's civil servant workforce." J.A. 224. That policy change helped bring NASA into compliance with *HSPD-12*, but it was also supported by NASA's independent judgment that requiring NACI background checks of contractors would improve system and facility security. *Ibid.*; see J.A. 170-183 (NASA Interim Directive (NPR 1600.1)) (adopting the identity credentialing standard set out in *FIPS 201-1*).

In 2007, NASA modified its contract with Caltech to require that all JPL employees undergo background checks using the NACI process. Pet. App. 5a; J.A. 225; see J.A. 157-162 (contracts).

4. The individual respondents are 28 Caltech employees working at JPL. Pet. App. 55a. They sued NASA, the Department of Commerce, Caltech, and others, seeking to bar implementation of the background-check process at JPL. *Ibid.*; J.A. 58-87 (complaint).[8] In respondents' view, the government's collection of information through the background-check process would violate, *inter alia*, the Fourth Amendment, the Privacy

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[7] NASA promulgated the policy pursuant to its authority under the National Aeronautics and Space Act of 1958, 42 U.S.C. 2455, 2456, 2456a, and 2473. Pet. App. 11a-13a.

[8] Although respondents seek to represent a class of similarly-situated JPL employees, J.A. 79-80, this case has not been certified as a class action.

Act, and an asserted constitutional right to informational privacy. J.A. 81-82, 84-85.[9]

The district court denied respondents' motion for a preliminary injunction. Pet. App. 54a-74a. The court divided respondents' claims into two categories: challenges to the collection of information through SF-85 and Form 42, and challenges to use of that information to make credentialing decisions. *Id.* at 62a. As to the latter challenge, the court concluded that respondents lacked standing and that their claim was not ripe for review. *Id.* at 63a. The court explained that because no background checks had been conducted for respondents, there was "not an imminent injury" and respondents' claim that credentialing decisions would be made using improper criteria was "strictly speculative." *Ibid.*

The court then rejected respondents' Fourth Amendment challenge to the collection of information through SF-85 and Form 42, explaining that respondents "make no argument that a questionnaire, background check, or authorization to release records constitutes a 'search.'" Pet. App. 64a. The court similarly rejected respondents' contention that the collection of information violates the Privacy Act, because "SF-85 specifically states that it complies with the Privacy Act" and respondents failed to

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[9] Respondents also alleged that the background-check process violated the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(C), and the California Constitution. Pet. App. 55a; J.A. 83, 85-86. The district court rejected the APA claim, Pet. App. 65a-66a, and accepted respondents' concession that their state-law claims were barred on intergovernmental immunity and sovereign immunity grounds, 07-CV-5669 Order 12 (C.D. Cal. Jan. 16, 2008) (Docket entry No. 71). Respondents appealed on the APA claim, but the court of appeals rejected it. Pet. App. 11a-13a.

"show that the information collected" would not be "properly maintained or gathered." *Id.* at 67a.

Finally, the district court held that the background-check process does not violate a constitutional right to informational privacy. Pet. App. 68a-72a. The court observed that SF-85 "is relatively non-intrusive" and "does not seek extensive or overly-sensitive information," and that the "very high-tech and sensitive devices at JPL * * * warrant strict security measures." *Id.* at 70a, 72a. The court found that "there are adequate safeguards in place when dealing with sensitive questions," and identified, as one example, SF-85's query about illegal drug use in the past year, which is followed by an assurance that any response will not be used in any subsequent criminal proceeding. *Id.* at 70a.

5. Respondents appealed, challenging the district court's rulings on the Fourth Amendment and informational privacy. Respondents did not renew on appeal their claim that the background-check process violates the Privacy Act. Resp. C.A. Br. 17-59. A motions panel of the court of appeals granted respondents an injunction pending appeal, and that injunction remains in effect today. Pet. App. 50a-53a. Specifically, the court enjoined the government "from requiring [respondents] to submit the [SF-85] questionnaires for non-sensitive positions, including the authorization forms for release of information." 07-56424 Docket entry No. 5 (9th Cir. Oct. 5, 2007); see Pet. App. 53a.

A merits panel then reversed the district court's decision, Pet. App. 30a-49a, and remanded with instructions to fashion preliminary injunctive relief consistent

with its opinion, *id.* at 49a.[10] In response to the government's petition for rehearing en banc, the merits panel withdrew its initial opinion and issued a revised opinion, again finding portions of SF-85 and Form 42 likely unconstitutional and ordering preliminary injunctive relief. *Id.* at 1a-29a.

In its revised opinion, the court first determined that the only claims properly before it were those related to the collection of information through SF-85 and Form 42. Pet. App. 8a-10a. The court "agree[d] with the district court" that respondents' challenges to how the information collected would be used to make credentialing decisions "are unripe and unfit for judicial review." *Id.* at 8a.

The court of appeals then rejected respondents' Fourth Amendment claim. Pet. App. 13a-17a. The court explained that the disclosure of information through "direct questioning" of the applicant is not a Fourth Amendment search, *id.* at 16a-17a, and that "[t]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities," *id.* at 15a (quoting *United States* v. *Miller*, 425 U.S. 435, 443 (1976)).

The court determined, however, that respondents were likely to succeed on the merits of their claim that the use of the forms violates a distinct constitutional right to informational privacy. Pet. App. 17a-26a. The

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[10] After the court of appeals' first decision in this case but before that court's second decision, the district court entered an order directing the government "to cease any further investigations of [JPL] employees" but determined that the government "may issue I.D. cards to those employees who have already cleared their background investigations." 07-CV-05669 Minute Order 1 (C.D. Cal. Mar. 13, 2008) (Docket entry No. 99).

court stated that "the Constitution protects an 'individual interest in avoiding disclosure of personal matters.'" *Id.* at 17a (quoting *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999), cert. denied, 528 U.S. 1189 (2000)). In the court's view, that right is implicated whenever the government seeks information that "is not generally disclosed by individuals to the public." *Id.* at 22a (quoting *Crawford*, 194 F.3d at 958). In such a situation, the court continued, the government must establish "that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Id.* at 18a (quoting *Crawford*, 194 F.3d at 959). The court described this inquiry as a balancing of "the government's interest in having or using the information against the individual's interest in denying access." *Ibid.* (quoting *Doe* v. *Attorney Gen. of the United States*, 941 F.2d 780, 796 (9th Cir. 1991), disapproved on other grounds by *Lane* v. *Pena*, 518 U.S. 187 (1996)).

The court noted respondents' concession that "most of the questions" on SF-85 "are unproblematic and do not implicate the constitutional right to informational privacy." Pet. App. 19a. And the court determined that the question asking the applicant to disclose recent illegal drug activity is permissible because it is "designed to limit the disclosure of personal information to that * * * necessary to further the government's legitimate interest" in preventing its strong stance in its war against illegal drugs from being undermined as a result of drug use by its employees and contractors. *Id.* at 20a-21a. But the court decided that the government cannot ask an applicant who has acknowledged using drugs the follow-up question whether he or she has obtained treatment or counseling, because "treatment or

counseling * * * would presumably *lessen* the government's concerns regarding the underlying activity." *Id* at 22a.

With respect to Form 42, the court acknowledged that the government "has several legitimate reasons for investigating its contractors," including the interest in "verifying its contractors' identities" and "ensuring the security of the JPL facility." Pet. App. 24a. The court also recognized that the request on Form 42 for "'any adverse information about this person's employment, residence, or activities'" "may solicit some information relevant to the applicant's identity or security risk." *Id.* at 25a (emphasis omitted). But the court believed that Form 42's questions are too "broad" and "open-ended" and therefore, under the standard the court propounded, are not narrowly tailored to advance the government's legitimate interests. *Id.* at 24a-25a.

6. The government filed a second petition for rehearing en banc, which was denied. Judge Wardlaw issued an opinion concurring in the denial of rehearing en banc. Pet. App. 76a-95a. Five judges joined three published dissents from denial of rehearing en banc. *Id.* at 96a-130a.

Judge Callahan's dissent (Pet. App. 96a-120a) regarded the panel's opinion as "an unprecedented expansion of the constitutional right to informational privacy" that could "undermine personnel background investigations performed daily by federal, state, and local governments" and "sharply curtail[] the degree to which the government can protect the safety and security of federal facilities." *Id.* at 97a, 120a.

Judge Kleinfeld's dissent (Pet. App. 120a-124a) concluded that the panel's opinion called into question the most basic investigation of an applicant by a prospective

employer, such as when a federal judge about to "hire law clerks and secretaries * * * talk[s] to professors and past employers and ask[s] some general questions about what they are like." *Id.* at 124a.

Chief Judge Kozinski also dissented. Pet. App. 125a-130a. He faulted the court for failing to distinguish between collection and disclosure of information, *id.* at 125a-126a; between voluntary disclosures and compelled disclosures, *id.* at 126a-127a; between information "pertain[ing] to a fundamental right" and "a free-standing right not to have the world know bad things about you," *id.* at 127a-128a; between collection of information from its source and collection of information from third parties, *id.* at 128a; and between the government's "functions as enforcer of the laws and as employer," *id.* at 128a-129a.

SUMMARY OF ARGUMENT

The government's collection of employment-related information through routine background checks of federal contract employees does not violate a constitutional right to informational privacy.

A. As the Court explained in *Whalen* v. *Roe*, 429 U.S. 589 (1977), the constitutional right to privacy encompasses at least two different kinds of interests: "the individual interest in avoiding disclosure of personal matters," and "the interest in independence in making certain kinds of important decisions." *Id.* at 598-600. This Court addressed the former in two longstanding decisions: *Whalen* and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). Those decisions set important limits on the informational privacy right. They recognize that the government, in a variety of roles, routinely collects personal information, and that constitutional privacy concerns are generally satisfied

by safeguards against unauthorized disclosure by the government.

B. The informational privacy interests in this case are limited. This case concerns only the government's collection of information, and not any interest in avoiding public disclosure of intimate information, because information gathered in the background-check process is protected by the Privacy Act and other safeguards. Moreover, the government is acting to further its substantial interests as employer and proprietor. "[T]he government as employer * * * has far broader powers than does the government as sovereign." *Engquist* v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008) (citation omitted). Any constitutional assessment therefore must account for the government's paramount interests as an employer and as a proprietor of facilities it owns. Here, it is clear from the face of SF-85 and Form 42 that they seek information only for employment-related purposes. Further, the government's need for that information is substantial, especially with respect to JPL, a key federal research and development facility.

C. The court of appeals erred in concluding that certain portions of the NACI background-check process likely violate a constitutional right to informational privacy.

The court erred in invalidating SF-85's drug-treatment question. The court mistakenly assumed that all questions regarding medical treatment implicate significant privacy concerns, and it gave short shrift to the government's interests in knowing whether an individual who has recently used illegal drugs has rehabilitated himself. As an employer, the federal government is legitimately concerned not only with recent illegal drug

use, but also with the steps that an employee or applicant has taken to ameliorate any potential problems.

The court of appeals likewise erred in concluding that the use of Form 42 likely violates respondents' constitutional rights. The court's analysis was untethered to any recognized private area; the court found constitutional fault because in its view the form's questions are too "open-ended." Contrary to the court's understanding, however, an applicant for federal contract employment has no constitutionally protected interest in preventing the government from asking designated references for information about or impressions of him. Moreover, to the extent that an applicant has disclosed certain facts to others, it is only in the rare case that he would continue to retain a constitutionally cognizable privacy interest in them. And it is plainly reasonable for the government to ask designated references and contracts about whether it should employ a particular individual.

D. The court's contrary conclusion is serious error. The court first failed to distinguish between the government's collection of information and public disclosure of information that it receives. The court then compounded its error by failing to account for the fact that this case arises in the employment context. And the court saw no constitutional difference between inquiries to the applicant and inquiries to third parties. Not surprisingly, the other courts of appeals that have considered similar challenges have rejected them. Respondents do not attempt to defend the reasoning of the court of appeals, instead focusing on a claim that both courts below found unripe and unsuitable for judicial review. The judgment of the court of appeals should be reversed.

ARGUMENT

THE GOVERNMENT'S COLLECTION OF INFORMATION THROUGH SF-85 AND FORM 42 FOR EMPLOYMENT-RELATED PURPOSES IS CONSTITUTIONAL

The Ninth Circuit has enjoined the government from conducting basic background checks of contract employees at the Nation's premier deep space and robotics facility. In the court's view, the government's use of a background check to collect information the contract employee would not normally make public implicates a constitutional privacy right. That is so, the court determined, regardless of whether the information is collected from the contract employee or from third parties, and regardless of whether the government protects the information collected from public disclosure. And when the privacy right is implicated, the court held, the government's justification must be balanced on an *ad hoc* basis against the individual's asserted privacy interest.

The Constitution, however, does not forbid the government from performing basic background checks like the ones at issue here. To be sure, the government, like any employer, is restricted from adopting abusive employment practices—and this case does not call for the Court to define the precise limits of constitutional protections concerning the government's gathering of information in various contexts. Rather, in this case, respondents' challenge is foreclosed in light of the reduced expectations of privacy in the employment context, the longstanding and widespread use of SF-85 and Form 42, the reasonableness of the challenged inquiries, and the Privacy Act's protections regarding the maintenance and dissemination of the information collected.

A. This Court Has Made Clear That Constitutional Privacy Concerns Are Not Triggered Merely Because The Government Collects Information About An Individual

1. As the Court explained in *Whalen* v. *Roe*, 429 U.S. 589 (1977), "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests": "the individual interest in avoiding disclosure of personal matters," and "the interest in independence in making certain kinds of important decisions." *Id.* at 598-600. Although the Court has discussed the latter interest on several occasions, it has addressed the constitutional protection against disclosure of personal matters in only two cases: *Whalen* and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977). In both of these longstanding opinions, the Court concluded that the challenged practice did not violate an asserted constitutional right concerning the privacy of information.

a. In *Whalen*, the Court considered a privacy-based constitutional challenge to a New York statute requiring doctors to report prescriptions for certain narcotics to the state health department. 429 U.S. at 591, 593. The state agency collected that information in order to identify stolen or altered prescriptions and uncover abuse of prescription narcotics. *Id.* at 592-593. The information was stored in a computer database. *Id.* at 593. Only a limited number of state employees had access to the database; records were destroyed after five years; and public disclosure of the patients' identities was prohibited by state law. *Id.* at 593-595 & n.12.

The Court rejected the argument that the State's collection of prescription information violated a constitutional informational privacy right. *Whalen*, 429 U.S. at 600, 604. The Court distinguished between the collec-

tion of information for governmental purposes and the government's disclosure of that information to the public. The Court determined that there was no realistic threat of public disclosure in light of the numerous steps taken to safeguard the information and the statutory and regulatory prohibitions on disclosure. *Id.* at 600-601. A "remote possibility" of public disclosure, the Court explained, "is surely not a sufficient reason for invalidating the entire patient-identification program." *Id.* at 601-602.

The Court then determined that the reporting of prescription information to health department employees did not itself violate a constitutional privacy right. *Whalen*, 429 U.S. at 602. Although "some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention," the Court explained, "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies" are a necessary feature of modern medical practice. *Ibid.* The Court concluded that the required reporting of narcotics prescription information to the state health department was not "meaningfully distinguishable" from such disclosures. *Ibid.*

b. Relying on *Whalen*, the Court in *Nixon* v. *Administrator of General Services*, *supra*, rejected a facial challenge to provisions of the Presidential Recordings and Materials Preservation Act, 44 U.S.C. 2111 note, that directed government archivists to obtain and preserve certain Presidential papers and tape-recorded conversations. 433 U.S. at 429. Former President Nixon contended that it would violate his constitutional right to privacy to allow government archivists to review his papers to determine which ones concerned official

business (and therefore would be archived) and which concerned personal matters (and would be returned to him). *Id.* at 434, 454-455, 459.

The Court assumed that the former President had a legitimate expectation of privacy in his personal materials, *Nixon*, 433 U.S. at 457-458, although it noted that this expectation was reduced by his status as a public figure, *id.* at 465. The Court concluded, however, that the limited review of private materials contemplated by the statute was permissible. The Court explained that the "overwhelming bulk" of the materials pertained to official Presidential business, and that in fact many of the items "were prepared and seen by others and were widely circulated within the Government." *Id.* at 459. For materials that the former president "ha[d] already disclosed to the public," the Court determined that the former President "cannot assert any privacy claim." *Ibid.*

As in *Whalen*, the Court focused on whether there was a realistic probability of public disclosure of private matters. *Nixon*, 433 U.S. at 458-460. The Court found the "privacy interest asserted" to be even "weaker" than in *Whalen*, because the statute "mandate[d] regulations * * * aimed at preventing undue dissemination of private materials" and the government did "not even retain long-term control over" those materials because the records would be returned to the former President. *Id.* at 458-459, 462. The Court noted that the parties agreed that the only way to identify which materials were subject to archival as official materials was "by screening all of the materials," and that screening would be conducted by government archivists with "an unblemished record for discretion." *Id.* at 460, 462, 465 (citation omitted). The Court further noted that such screening of papers

had been conducted in establishing Presidential libraries for a number of former Presidents. *Id.* at 462. In light of the President's "lack of any expectation of privacy in the overwhelming majority of materials," the numerous protections against public disclosure of private papers, and the significant public interest in preserving official materials, the Court rejected the privacy-based challenge to the Act. *Id.* at 465.

2. *Whalen* and *Nixon* identify several commonsense principles that govern constitutional analysis of privacy interests when the government collects information about an individual. First, the Court recognized that there is a significant difference between the collection of information by the government for legitimate governmental purposes, and the subsequent disclosure of that information to the public. The essence of the privacy interest, the Court has explained, is "keeping personal facts away from *the public eye*." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 769 (1989) (emphasis added). Accordingly, when measures have been taken to protect personal information from public disclosure, the Court found that basic privacy concerns have been satisfied. *Nixon*, 433 U.S. at 458-460; *Whalen*, 429 U.S. at 601-602. A "remote possibility" of public disclosure, the Court explained, is not enough to invalidate a statutory or regulatory scheme, especially one that includes specific protections against such disclosure. *Whalen*, 429 U.S. at 601-602.

Second, the Court did not perceive a significant constitutional issue in the government's mere collection or review of the information for a legitimate purpose. To the contrary, in *Whalen*, the Court noted that the government often must collect personal information in or-

der to fulfill basic government functions, observing that "[t]he collection of taxes, the distribution of welfare, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require" the government to collect certain information that would be "potentially embarrassing or harmful" if publicly disclosed. 429 U.S. at 605. Because collection of the information thus fell within an established norm, there was not a significant interference with the individual's privacy interest. *Id.* at 602. Indeed, the Court observed in *Whalen* that it had upheld reporting requirements even where the information concerned the exercise of a recognized constitutional right, such as the right to "mak[e] the abortion decision free of governmental intrusion." *Id.* at 602 n.29 (citing *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 79-81 (1976)).

Moreover, in *Nixon* the Court cautioned against considering privacy-based claims "in the abstract," without a careful consideration "of the specific provisions" of the government's program. 433 U.S. at 458. And in *Whalen*, the Court pointed out that "[t]he [government's] right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." 429 U.S. at 605. "Recognizing that in some circumstances that duty arguably has roots in the Constitution," the Court concluded that the statutory and regulatory scheme in that case "evidence[d] a proper concern with, and protection of, the individual's interest in privacy." *Ibid.* The Court did not second-guess the government's need for the information or its methods of obtaining it, instead noting that the statute was "the product of an orderly and rational legislative decision." *Id.* at 597.

Finally, the Court suggested in *Nixon* that privacy interests are substantially lessened when the individual has not kept the information private. The Court observed that "of course" the former President "cannot assert any privacy claim as to the documents and tape recordings that he has already disclosed to the public." *Nixon*, 433 U.S. at 459.

B. This Case Involves Only The Routine Collection Of Employment-Related Information By The Government Acting In Its Capacity As An Employer And Proprietor

This case concerns a challenge to the government's routine request for and receipt of employment-related information concerning its contract employees. The information received in the background-check process is protected from public disclosure by the Privacy Act and by additional procedures adopted by the relevant agencies. And the government requests this information not as a regulator of private conduct, but as an employer and proprietor, to protect the security of its facilities and information systems. This routine and longstanding practice does not trigger significant constitutional concerns.

1. This case concerns the government's collection of information, subject to the Privacy Act, not disclosure to the public

Respondents challenge the government's request for and receipt of certain information through the NACI process. J.A. 59-60. In their complaint, they made no allegation that the information would be disclosed publicly. The sole question is whether the Constitution prevents the government from requesting information about contract employees who seek access to its own facilities or information systems.

a. Like *Whalen* and *Nixon*, this case presents no realistic threat of public disclosure of information that comes into the government's possession. All of the information received through the NACI background-check process is protected against public disclosure by a panoply of reinforcing measures. Chief among them is the Privacy Act, 5 U.S.C. 552a. SF-85 states at the outset that the government will "protect [the information provided] from unauthorized disclosure" and that, in particular, "[t]he collection, maintenance, and disclosure of background investigative information is governed by the Privacy Act." J.A. 89. Form 42 similarly states that the government's "investigative inquiry is in full compliance with the Privacy Act of 1974 and other laws protecting the civil rights of the person we are investigating." J.A. 96.

In requiring background checks for contract employees, the President, the Commerce Department, and OMB took great care to stress that information obtained would be protected by the Privacy Act. See J.A. 129 (*HSPD-12*) (the directive "shall be implemented in a manner consistent with * * * the Privacy Act"); J.A. 147 (*FIPS 201-1*) (new credentialing standard should be implemented "in accordance with * * * Federal privacy laws and policies including but not limited to * * * the Privacy Act of 1974"); J.A. 120 (OMB memo) (background-check information must be "handled consistent with the Privacy Act"). And when NASA independently decided to require background checks for its contract employees, it emphasized that "[a]ny and all individuals" involved in the process "must adhere strictly to the requirements of the * * * Privacy Act." J.A. 178-179; see J.A. 172.

b. The Privacy Act reflects the longstanding judgment by Congress as to the best means of protecting personal information from improper disclosure without unduly impairing the effective operation of government. The Act governs both what information may be collected by the government and how that information will be protected from unwarranted disclosure. It permits a federal agency to collect and maintain in a system of records only information that is "relevant and necessary" to accomplish the agency's purposes, 5 U.S.C. 552a(e)(1), and it bars the agency from disclosing to any person or other agency "any record which is contained in a system of records" maintained by the agency, unless the individual to whom the record pertains has provided written consent, or disclosure is authorized by a statutory exception. 5 U.S.C. 552a(b). The Act allows an individual to gain access to the records that pertain to him and to seek amendment of those records if they are "not accurate, relevant, timely, or complete." 5 U.S.C. 552a(d)(1)-(2). Finally, the Act provides a civil remedy for individuals whose files are not maintained consistent with the Act, 5 U.S.C. 552a(g)(1); see *Doe* v. *Chao*, 540 U.S. 614 (2004), as well as criminal liability for federal employees who willfully violate certain provisions of the Act, 5 U.S.C. 552a(i)(1).

As this Court has stated, the Privacy Act "give[s] forceful recognition" to a person's "interest in preserving the confidentiality of sensitive information contained in his personnel file." *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318 n.16 (1979). Respondents abandoned on appeal any claim that the background-check process or the forms used in it violate the Privacy Act, and it therefore must be assumed for present purposes that the

background-check process is conducted in a manner that complies with the Privacy Act.

The government has employed the NACI process for over 50 years, and the Privacy Act has been in place since 1975, yet there is no suggestion that the Privacy Act's protections have proven inadequate to protect information obtained through background checks. Cf. *Whalen*, 429 U.S. at 601 (crediting program's experience in protecting privacy). To the contrary, the courts have recognized that the Privacy Act provides an important and effective source of protection for that information. See, *e.g.*, *AFGE* v. *HUD*, 118 F.3d 786, 793 (D.C. Cir. 1997) (relying on Privacy Act protections in finding no realistic prospect of public disclosure of information gathered in background investigations); see also *NTEU* v. *United States Dep't of the Treasury*, 25 F.3d 237, 244 (5th Cir. 1994). And there is no reason to assume that the Privacy Act is ineffectual where (as here) respondents have challenged the use of SF-85 and Form 42 on their face.

c. In addition to the Privacy Act, there are other protections for information collected through the NACI background-check process. In requiring that background checks be conducted for federal contract employees, the Commerce Department provided detailed requirements for protecting the information collected, including access controls and technological standards. J.A. 147-150. Similarly, OMB has issued specific guidance regarding agencies' privacy-related responsibilities in the background-check process. OMB has directed each agency to ensure compliance with the Privacy Act, to assign an individual to oversee privacy-related matters, to prepare and make publicly available a comprehensive privacy impact assessment, and to develop and

implement sanctions for any violations of privacy policies. J.A. 120-122. This Commerce Department and OMB guidance is binding on federal agencies (under *HSPD-12*, 15 U.S.C. 278g-3, 40 U.S.C. 11331, and 44 U.S.C. 3543-3544) and on government contractors (through the Federal Acquisition Regulation, 48 C.F.R. 52.204-9).[11]

The numerous statutory and regulatory protections for information obtained through the background-check process make plain that respondents are not challenging a program that implicates the principal concern for the privacy of personal information, *viz*, the right to "keep[] personal facts away from the public eye." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 769.

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[11] NASA has carefully guarded the privacy of JPL employees, including as against Caltech, their employer. NASA's public notices implementing the Privacy Act for *HSPD-12* limit disclosures to agency contractors to instances in which the contractors "need to have access to the records in order to perform their activity." 71 Fed. Reg. 45,859-45,860 (2006). In accordance with that guidance, JPL plays a very limited role in the background checks at issue here: after a JPL employee completes an SF-85, one of a small number of JPL "approvers" checks to see that all questions have been answered, and then forwards the SF-85 form on to OPM. J.A. 207-208, 211-212. JPL maintains "no record of the SF 85 the applicants complete" and plays no further role in the background-check process. J.A. 212.

Once OPM receives the SF-85 form, it sends written inquiries, including Form 42, to verify the information provided on SF-85. Pet. App. 4a. OPM provides a report of the investigation to NASA, and NASA decides whether to grant credentials, deny credentials, or investigate further. J.A. 225. If an employee is denied credentials, he or she is informed of the reasons for NASA's decision and has an opportunity to appeal. J.A. 181-183, 212.

2. Any privacy interests implicated in this case are further limited because SF-85 and Form 42 seek information only for employment-related purposes

The context of the background-check inquiries at issue in this case further demonstrates that they do not entail any substantial intrusion into personal privacy.

a. Commerce Department and OMB standards require that a background check be conducted for all contract employees who require long-term access to federal facilities and information systems, in order to verify the individuals' identities and ensure that they are sufficiently reliable and trustworthy to be granted such access. J.A. 143-147, 217-218, 222-223, 225. The government first seeks information from the applicant, including biographical data and educational and work history, as well as information about compliance with the law and activities that could interfere with the applicant's ability to perform safely and productively. See J.A. 88, 90-94. The government then verifies that information by checking government databases and by sending written inquiries to the references and other contacts provided by the applicant on SF-85. 75 Fed. Reg. at 5359; see J.A. 96-97. Once the government gathers that information, the relevant contracting agency decides whether to grant the individual an identity credential. See J.A. 89. The information collected is not to be used for any other purpose. See, *e.g.*, 75 Fed. Reg. at 5359.

The government conducts NACI background checks using standard forms, such as SF-85 and Form 42. SF-85 states that its purpose is to collect information in order to "conduct [a] background investigation[]" to determine whether the individual is "suitable for the job," meaning "reliable, trustworthy, and of good conduct and character." J.A. 88; see J.A. 89. Form 42 similarly

informs the recipient that "[y]our name has been provided by the person identified below to assist in completing a background investigation," and it limits its inquiry to matters that "have a bearing on this person's suitability for government employment or a security clearance." J.A. 96-97.

Respondents speculate (Br. in Opp. 19-20) that the government might use these forms to obtain non-employment-related information. But that conjecture is belied by the forms' express statement of their purpose and scope, which is particularly pertinent because the court of appeals' decision was based on a reading of the forms on their face. Moreover, the only sources from which the government seeks information on these forms are the applicant himself and those references and contacts he identifies. J.A. 96, 210, 218; 75 Fed. Reg. at 5359. A person does not have a privacy interest protected by the Constitution in information that is in the possession of third parties such as employers, educational institutions, and landlords, and that is relevant to suitability for employment. See pp. 52-53, *infra*. Finally, as discussed above, the background checks are governed by the Privacy Act, which permits a federal agency to collect and maintain in its records "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. 552a(e)(1). There is accordingly no reason to doubt in this broad-based challenge that the forms legitimately seek and elicit information that is

relevant to respondents' employment and access to federal facilities and information systems.[12]

b. In conducting the challenged background checks, the government is acting as an employer and a proprietor of federally owned facilities and information systems, not as a regulator of private conduct. This Court has long recognized that there is a "crucial" constitutional difference between "the government exercising 'the power to regulate * * * as a lawmaker,' and the government acting 'as proprietor, to manage [its] internal operation.'" *Engquist* v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008) (quoting *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961)) (brackets in original). In the public employment context, "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." *Ibid.* (quoting *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion)). The government must have "far broader powers" when acting as employer than as sovereign, *ibid.* (quoting *Waters*, 511 U.S. at 671 (plurality opinion)), because the government could not function effectively if "every employment decision became a constitutional matter," *ibid.* (quoting *Connick* v. *Myers*, 461 U.S. 138, 143 (1983)). Further, "[t]he employee's expectation of privacy must be assessed in the context of the employment relation." *O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion); see *Engquist*, 128 S. Ct. at 2151. Accordingly, "'absent the most unusual cir-

[12] If respondents have concerns about their own individual records, they may invoke their rights under the Privacy Act to gain access to records pertaining to them to ensure that those records are maintained in accordance with the Act.

cumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision'" made by the government. *Id.* at 2152 (quoting *Connick*, 461 U.S. at 147); see also *Garcetti* v. *Ceballos*, 547 U.S. 410, 418-419, 422-423 (2006).

These principles are particularly applicable here. Respondents are contract employees who work at a facility owned by NASA, and their duties are similar to those performed by their civil service counterparts at other NASA centers. J.A. 221.[13] The government conducts background checks before entrusting them with access to federal facilities and information systems for essentially the same reasons that it conducts background checks of civil service employees. J.A. 218, 222-223, 225. The government is not conducting free-ranging inquiries into citizens' private affairs; it is requesting employment-related information from persons who wish to work for the government as contract employees and seek access to federal facilities to do so.

Background checks are familiar and broadly accepted in our society. Private employers commonly conduct background checks before making hiring decisions. See, *e.g.*, Society for Human Res. Mgmt., *Background Checking: Conducting Reference Background Checks* 4 (Jan. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Documents/Background%20Check_Reference.pptx (76% of surveyed employers conduct background checks for all job

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[13] The fact that respondents are employees of contractors hired by the government, rather than civil service employees hired directly by the government, does not lessen the government's broad authority to ensure secure and effective government operations. See, *e.g.*, *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 677-678 (1996); *Lefkowitz* v. *Turley*, 414 U.S. 70, 82-83 (1973).

candidates). Conducting background checks "makes good sense" because it allows an employer "to verify the accuracy of information in a prospective employee's job application form and potentially prevents future * * * lawsuits" that could result from hiring an unqualified or untrustworthy employee. Max Muller, *The Manager's Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need to Know* 203 (2009). Many States have statutes requiring that background checks be conducted for applicants for certain state positions, including positions in schools, mental health facilities, hospitals, and social services organizations. Philip D. Dickinson, *Hiring Smart: How to Conduct Background Checks* 13-18 (1997) (surveying state laws) (*Hiring Smart*); Barbara A. Lee, *Who Are You? Fraudulent Credentials and Background Checks in Academe*, 32 J.C. & U.L. 655, 663 n.83 (2006) (same); Barry J. Nadell, *Sleuthing 101, Background Checks and the Law* 49-130 (2004) (same). And the federal government has conducted background checks for millions of civil service employees over the past 50 years, using the process at issue here. See Exec. Order No. 10,450, *supra*; 75 Fed. Reg. at 5359. This pervasive and longstanding practice throughout society fatally undermines respondents' contention that the government's use of routine forms such as SF-85 and Form 42 to conduct background checks for contract employees, subject to protection of the Privacy Act and the additional measures described above, raises privacy concerns of a constitutional dimension.

c. It is particularly important for the government to conduct background checks at key federal research facilities like JPL. JPL is one of the Nation's premier space and robotics research and development facilities,

and it is staffed exclusively with contract employees. See Pet. App. 96a, 98a-99a (Callahan, J., dissenting from denial of rehearing en banc); J.A. 206, 221-222. Its annual operating budget is over $1.5 billion, representing a significant investment by American taxpayers. Pet. App. 24a; JPL, NASA, *Jet Propulsion Laboratory Annual Report 08*, at 33 (2009), www.jpl.nasa.gov/annualreport/2008-report.pdf. The government may legitimately conduct background investigations of individuals with access to JPL facilities and information systems in order to protect those investments.[14]

The court of appeals believed that the government's interests are lessened by the fact that respondents are classified as "low risk" employees. Pet. App. 24a-25a.[15] But "low risk" is not "no risk." Many of JPL's projects "require broad access to many NASA physical and logical facilities," J.A. 221, and low risk employees work on a wide variety of mission-critical and technologically

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[14] Respondents suggest (Br. in Opp. 3) that JPL operates as an "open campus" with minimal security. That is wrong. Access to JPL's 175-acre campus is controlled through a number of security checkpoints. J.A. 206-207. The three main entrances are controlled by security gates, and employees must scan their badges in order to enter. J.A. 206. There are also turnstiles at parking areas, which require a badge for entry. J.A. 206-207. Every person who seeks unescorted access to JPL, including Caltech faculty, must apply for and receive a badge from NASA. J.A. 213.

[15] Contrary to the suggestion in Judge Wardlaw's concurrence in the denial of rehearing en banc, Pet. App. 77a n.3, NASA did not designate the positions as "low risk" pursuant to 5 C.F.R. 731.106, a regulation applicable only to Federal employees. See 5 C.F.R. 731.101 (defining positions covered by the regulation). Rather, Caltech designated the positions as "low risk" using criteria issued by NASA pursuant to its authority under the National Aeronautics and Space Act of 1958. See J.A. 208-209; C.A. E.R. 513-516.

advanced projects. Respondents' own submissions prove the point. Although all of the respondents are classified as low risk employees, they are responsible for such tasks as:

- ensuring "compliance with * * * International Traffic and Arms Regulations (ITAR) and Export Administration Regulations (EAR)," C.A. E.R. 968;
- conducting laboratory tests to "assess the characteristics" of spacecraft materials, including analyzing material failures, C.A. E.R. 1439;
- reviewing the "technical work" of all engineers involved in flight dynamics, including work on "mission design, trajectory optimization, navigation and guidance[,] and control," C.A. E.R. 1220;
- managing a group of twenty senior engineers and being "formally accountable as NASA's Technical Authority for th[e] $568 [million]" Kepler space observatory, C.A. E.R. 1396;
- leading the team of 40 engineers who "design, validate, and compile all of the command sequences used to operate the rovers on Mars," C.A. E.R. 1444; and
- managing JPL's Data System Standards Program, which works to develop "space communications and navigation standards" that are "critical to the success and the science data return of the JPL missions," C.A. E.R. 1480.

Respondents are properly proud of the responsibilities they assume as JPL employees. But the very nature of those responsibilities underscores the legitimacy of the

government's decision to conduct the routine background checks that respondents challenge.

C. The Use Of SF-85 And Form 42 To Conduct Background Checks Of Contract Employees Is Constitutional

The court of appeals erred in holding that it likely violates the Constitution for the government to ask a contract employee and his designated references certain questions on SF-85 and Form 42. One question on SF-85 addresses illegal drug use, an area in which the court of appeals recognized that an individual has minimal (if any) privacy rights. For that question, any privacy interests implicated are greatly outweighed by the government's need for the information in order to ensure the safety and security of its facilities and information systems. The routine inquiries contained on Form 42 likewise do not implicate significant privacy concerns. The form seeks information and opinions about the applicant from third-party references, and the applicant generally does not have cognizable privacy interests in such information. Moreover, the types of questions contained on Form 42 are commonplace and are an effective way to identify reasons why an applicant should not be granted access to federal facilities and information systems. It would be extraordinary to invalidate such inquiries on constitutional grounds, particularity with respect to an important federal research facility like JPL.

1. The government may ask contract employees who have used illegal drugs in the previous year whether they have sought treatment or counseling

Respondents "concede that most of the questions on SF-85 are unproblematic and do not implicate" constitutional concerns. Pet. App. 19a. But they challenged one of the questions on SF-85, which asks about treatment

or counseling for illegal drug use, and the court of appeals held that part of the question likely violates respondents' constitutional rights. Significantly, the court recognized that the government has a strong interest "in uncovering and addressing illegal substance abuse among its employees and contractors," and that the question asking an applicant whether he has used illegal drugs in the past year is "narrowly tailored" to "limit the disclosure of personal information to that * * * necessary to further" that interest. *Id.* at 19a-21a. But the court decided that the government may not ask the applicant— as part of a follow-up question asking for the details of the applicant's involvement with illegal drugs—to "[i]nclude any treatment or counseling received." J.A. 94; see Pet. App. 22a. The court gave two reasons. First, it stated that "[i]nformation relating to medical treatment and psychological counseling falls within the domain protected by the constitutional right to informational privacy." Pet. App. 22a. Second, it determined that the government does not have "any legitimate interest" in seeking such information, because "any treatment or counseling would presumably lessen the government's concerns regarding the underlying activity." *Ibid.* The court's reasoning was seriously flawed.

a. The court of appeals erred in assuming that the request to include treatment or counseling among the information requested in an otherwise constitutionally permissible question about illegal drug use raises any significant constitutional privacy concerns in this specific context. Drug treatment has not been recognized as one of the "fundamental" matters protected by the privacy guarantee in the Due Process Clause. See, *e.g.*, *Paul* v. *Davis*, 424 U.S. 693, 713 (1976) (defining as "fun-

damental" matters "relating to marriage, procreation, contraception, family relationships, and child rearing and education").[16] As the court of appeals itself noted, several courts "have been skeptical that questions concerning illegal drugs * * * would even implicate the right to informational privacy," because the drug laws "put citizens on notice this realm is not a private one." Pet. App. 19a-20a (quoting *Mangels* v. *Pena*, 789 F.2d 836, 839 (10th Cir. 1986)); see *NTEU*, 25 F.3d at 243 & n.3 ("[A]nyone who works for the government has a diminished expectation that his drug * * * abuse history can be kept secret, given that he works for the very government that has declared war on substance abuse."). While it is true that the government seeks not only information about illegal drug use but about treatment or counseling, that additional inquiry is not constitutionally objectionable. The inquiry is limited to treatment for illegal drug use, and the government's reason for seeking the information is to determine whether the illegal drug use is ongoing and whether it would affect the applicant's work performance.

The court of appeals assumed that all "medical information" is "squarely within" the constitutional right to

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[16] The few court of appeals decisions that have suggested that the government's mere collection of information can implicate constitutional privacy concerns generally have involved core concerns such as "contraception, abortion, marriage, and family life." *Thorne* v. *City of El Segundo*, 726 F.2d 459, 462 & n.1, 468 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984); see, *e.g.*, *Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 551-552 (9th Cir. 2004); *Eastwood* v. *Department of Corr.*, 846 F.2d 627, 630-631 (10th Cir. 1988); but see *United States* v. *Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (privacy interest implicated by disclosure of subpoenaed medical records to the government, where the records were "more extensive than the mere fact of prescription drug usage by identified patients considered in *Whalen* v. *Roe*").

informational privacy. Pet. App. 22a. That was error. SF-85 does not request even general medical information, let alone medical records or information relating to matters such as procreation.[17] And a person seeking access to federal facilities as a federal contract employee has no constitutional shield from tailored questions about her use of illegal narcotics. The drug-treatment question specifies no level of required detail, and seeks information directly pertinent to recent illegal drug use —a matter that the court of appeals held is a proper subject of inquiry in this employment-related context. Such a question does not raise the same constitutional concerns as questions having no relationship to unlawful activity or questions intruding into the core interests identified in this Court's jurisprudence.

b. In any event, any intrusion on a contract employee's privacy interests must be balanced against the government's need, in its role as a public employer, to obtain drug-treatment information. The impact on privacy in this case is limited. This case concerns only the collection of information by the government, not public disclosure. This case therefore does not implicate the key concern addressed by the interest in informational privacy—that "the information will become publicly known." *Whalen*, 429 U.S. at 600; see pp. 24-25, *supra*. Moreover, the Privacy Act and various agency regulations ensure that the information collected will be used only for appropriate employment-related and credentialing purposes and will not be disclosed publicly. See pp. 27-30, *supra*; cf. *Skinner* v. *Railway Labor Execu-*

[17] Although SF-85 requests the applicant's authorization for the release of information, that release does not extend to medical records. J.A. 95. The government must request a separate waiver in order to obtain medical records. *Ibid.*; see C.A. E.R. 45.

tives' Ass'n, 489 U.S. 602, 626 n.7 (1989) (government's collection of information about an employee's legal drug use, acquired to aid the government in testing for illegal drugs, was not a "significant invasion of privacy" where there was "no indication that the government does not treat this information as confidential, or that it uses the information for any other purpose").

Finally, the question about recent illegal drug use and counseling is not meaningfully distinguishable from the type of legitimate inquiry that might be posed by a responsible private employer. That is especially true in light of the routine and longstanding nature of this inquiry in the federal sector: OPM reports that over one hundred thousand individuals complete SF-85 annually, and that the form has included a question soliciting information about applicants' drug use since 1987.

The minimal interference with privacy interests in these circumstances is far outweighed by the government's interests in the question concerning illegal drug use, including treatment or counseling. The government must be able to ensure the safety and security of important federal facilities like JPL. See pp. 33-38, *supra*. As the court of appeals recognized, the government asks subjects of a background investigation whether they have used illegal drugs in the previous year in order to establish whether they would be reliable, law-abiding, and trustworthy contract employees. Pet. App. 21a; see *id.* at 13a n.3 (noting that government has the authority to conduct drug testing of certain contract employees); see generally, *e.g.*, Gerald-Mark Breen & Jonathan Matusitz, *An Updated Examination of the Effects of Illegal Drug Use in the Workplace*, 19 J. Hum. Behavior in the Soc. Env't 434 (2009) (finding that illicit drug use was negatively correlated with various measures of

workplace productivity). Not surprisingly, courts have routinely upheld the government's questioning of potential employees about recent drug use. See, *e.g.*, *AFGE*, 118 F.3d at 792-794; *NTEU*, 25 F.3d at 243; cf. *National Fed'n of Fed. Employees* v. *Greenberg*, 983 F.2d 286, 291-293 (D.C. Cir. 1993) (rejecting Fifth Amendment challenge).

As an employer or prospective employer, either directly or through contractors having access to federal facilities, the government's interest is not merely in learning about recent illegal drug use, but in knowing whether that drug use makes an individual unsuitable for employment or access. When the former Civil Service Commission first decided to examine drug use as part of its assessment of employee suitability, it stressed its interest in identifying cases "in which, *despite counseling and rehabilitation programs*, there is little chance for effective rehabilitation." 38 Fed. Reg. 33,315 (1973) (emphasis added). In fact, although the court of appeals here said that the government lacked "any legitimate interest" in that inquiry, in doing so it stated the very reason for the question: "treatment or counseling received for illegal drug use * * * *lessen*[*s*] the government's concerns regarding the underlying activity." Pet. App. 22a. Knowing about an employee's drug treatment also may help the government avoid disability discrimination, because under the Rehabilitation Act of 1973, an individual who was once addicted to illegal drugs but successfully underwent treatment may qualify as "disabled." 29 U.S.C. 705(20)(C)(ii); *EEOC Compl. Man. (CCH)* § 902.6, at 5322 (Mar. 1995). And because this inquiry is made in the public employment context, where the government has "far broader powers" than when acting as sovereign, *Engquist*, 128 S. Ct. at 2151

(citation omitted), the courts should not second-guess the government's judgment about the need for information about recent drug use. The court of appeals therefore erred in holding that the inclusion of the treatment inquiry as part of the question concerning use of illegal drugs likely violates the Constitution.

2. The government may send Form 42 to a contract employee's designated references and contacts

The court of appeals found Form 42 "much more problematic" than the drug-treatment question on SF-85, because in its view, that form's "open-ended questions are designed to elicit a wide range of adverse, private information." Pet. App. 22a. Although the court "agree[d] with the government that it has several legitimate interests in investigating its contractors," the court determined that "Form 42's broad, open-ended questions appear to range far beyond" those interests. *Id.* at 24a-25a. The court therefore concluded that use of the form likely violates the Constitution. *Id.* at 26a.

a. The use of Form 42 in this context does not implicate privacy interests of a constitutional dimension. None of its questions requests information that infringes on recognized constitutional interests, see, *e.g.*, *Paul*, 424 U.S. at 713, and the court of appeals did not suggest otherwise.

Most of the questions on the form are related to the government's efforts to verify the information submitted by the applicant. The form asks how long the reference has known the applicant, the context of that association, and whether the recipient can verify particular information provided by the applicant, among other questions. J.A. 97. This helps the government verify that its contract employees are who they claim to be, and also helps

the government verify that they have not misrepresented their backgrounds.

The other questions are geared toward the applicant's suitability for access to federal facilities and are the same types of inquires that a similarly situated private employer would ask. The form asks designated references if they have "any reason to question [the applicant's] honesty or trustworthiness," whether the reference would recommend the applicant for government employment, and whether the reference has "adverse information" about the applicant concerning violations of the law, financial integrity, or mental or emotional stability. J.A. 97 (Question 7). The request for an explanation of any such "adverse information" makes clear that the request is for information that "may have a bearing on [the subject's] suitability for government employment." *Ibid.* (Question 8). And Form 42 is sent only to references and former landlords that the applicant lists on SF-85. J.A. 96, 210, 218; 75 Fed. Reg. at 5359. Moreover, Form 42 must comply with the Privacy Act, which permits a federal agency to collect and maintain only the information that is "relevant and necessary" to accomplish its purposes. 5 U.S.C. 552a(e)(1). Form 42 thus is neither designed nor used for unanchored inquiries into an individual's personal affairs.

b. That the request for information is in some respects "open-ended," Pet. App. 25a, does not raise constitutional concerns. Open-ended questions are commonly used by public and private employers. Many employers consider such questions essential to an effective background or reference check. See, *e.g.*, Paul William Barada & J. Michael McLaughlin, *Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business, and Your Family* 52, 203 (2004);

Hiring Smart 66-67. As Judge Kleinfeld noted below, "Most of us do not hire law clerks and secretaries without talking to professors and past employers and asking some general questions about what they are like," because "[w]ithout open-ended questions, it is hard to know what potential problems might need an explanation." Pet. App. 124a (dissenting from denial of rehearing en banc). Since 1953, the government has sent "written inquiries to * * * former employers and supervisors, references, and schools attended" by prospective federal employees. See Exec. Order 10,450, § 3(a), 3 C.F.R. 937 (1949-1953 Comp.). The court of appeals had no basis for calling into question that longstanding practice and preventing the government from "doing what any sensible private employer would do." Pet. App. 121a (Kleinfeld, J., dissenting from denial of rehearing en banc).

c. Aside from asking the reference to verify certain information furnished by the applicant, Form 42 generally seeks information concerning a third-party reference's observations or impressions of an applicant. A reference may say that an applicant worked well with others, or describe him as trustworthy, or observe that he often arrived late to work, or note that he was a problematic tenant, or say he was seen dealing in drugs. An applicant does not have a constitutional right to preclude the government from posing such inquiries to landlords, former employers, educational institutions, or other third parties identified by the applicant as references or contacts. Such information in the possession of third parties in the ordinary course of their dealings with the applicant is not protected by any constitutional right to privacy or a fundamental interest in "personal auton-

omy." *Washington* v. *Glucksberg*, 521 U.S. 702, 727 (1997).

Even if Form 42 might lead a third-party reference to report information that an applicant disclosed to the third party and would not want made public, the simple act of asking a reference about an applicant for plainly legitimate governmental purposes, subject to the protections of the Privacy Act, does not violate the Constitution. Questions to third parties rarely raise constitutional privacy concerns, because the applicant has not kept the information private. See pp. 52-53, *infra*. The court of appeals recognized the Fourth Amendment precedent to that effect, Pet. App. 14a-16a, but stated that the inquiry should turn on "the nature of the information sought—in particular, whether it is sufficiently 'personal' to merit protection—rather than on the manner in which the information is sought," *id.* at 22a-23a n.5 (citation omitted). But the fact that an individual has already disclosed certain information to third parties surely must diminish any privacy interest in that information.

If a constitutionally cognizable privacy interest were implicated in this context, the government's interests in requesting the information would outweigh any intrusion on private affairs. Because the Form 42 inquiries are so clearly related to identity verification and employment suitability, a government agency acts reasonably in sending such inquiries.

D. The Court Of Appeals' Analysis Ignored The *Whalen* And *Nixon* Framework

In concluding that the background-check inquiries at issue in this case likely violate the Constitution, the court of appeals strayed far afield of this Court's guid-

ance in *Whalen* and *Nixon*. The court of appeals broadly defined what must be regarded as "private," requiring constitutional scrutiny any time the government seeks information that an individual would not generally disclose to the public. And the court utilized a one-size-fits-all test that equated the government's collection of information with the public disclosure of that information, failed to distinguish between the government's role as employer or proprietor and its role as sovereign, and assumed that the same privacy interests are implicated when information is sought from the source as when it is sought from third parties.

1. The Ninth Circuit recognized a broad constitutional right to informational privacy, one that goes well beyond the limits this Court set out in *Whalen* and *Nixon*. The court stated that a constitutional privacy right is implicated by the collection or dissemination of any information an individual would "not generally disclose[] * * * to the public." Pet. App. 21a (quoting *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999)). And applying that standard, the court determined that "[b]oth the SF 85 questionnaire and the Form 42 written inquiries require the disclosure of personal information." *Id.* at 18a.

The court did not tether that broad privacy right to any particular provisions of the Constitution. Assuming that such a right is grounded in the Due Process Clause, see, *e.g.*, *Glucksberg*, 521 U.S. at 719-720,[18] the court of

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[18] In the district court, respondents asserted that their informational privacy claim arose under the Fourteenth Amendment. J.A. 82. The district court rejected that view because the Fourteenth Amendment does not apply to the federal government. Pet. App. 64a-65a. On appeal, respondents suggested that an informational privacy right could be "grounded * * * in various provisions of the Constitution" but did

appeals should have employed this Court's "established method of substantive-due-process analysis," which requires "a careful description of the asserted fundamental liberty interest" and an inquiry into whether that interest is "fundamental" and "deeply rooted in this Nation's history and tradition." *Id.* at 720-722 (internal quotation marks and citations omitted). That is not to say that a constitutionally cognizable privacy interest is limited only to information that pertains to an already-established private sphere—such as "marriage, procreation, contraception, family relationships, child rearing, and education," *id.* at 726 (citation omitted)—but simply that the court should have anchored its analysis in an assessment of whether the interests at stake are of comparable magnitude and sensitivity as to trigger constitutional scrutiny. The failure to conduct such an analysis would enmesh the courts in a "subjective" and "complex balancing of competing interests," *id.* at 722, every time the government seeks information the individual would choose not to disclose publicly.

The court of appeals then further erred in articulating an *ad hoc* balancing test for determining if the Constitution is violated by particular inquiries. The court set out a non-exclusive list of factors that may be relevant to this inquiry, including "the type of [information] requested," "the potential for harm in any subsequent nonconsensual disclosure," "the adequacy of safeguards to prevent unauthorized disclosure," "the degree of need for access" to the information, "and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest" justifying that ac-

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not rely upon or discuss any specific provisions of the Constitution. Resp. C.A. Br. 23 n.16, 25 n.18.

cess. Pet. App. 18a (quoting *Doe* v. *Attorney Gen. of the United States*, 941 F.2d 780, 796 (9th Cir. 1991), disapproved on other grounds by *Lane* v. *Pena*, 518 U.S. 187 (1996)) (brackets in original). But the court did not provide additional detail about how these factors would affect the analysis. Instead, it stated that in every case, the government would be required to "show[] that its use of the information would advance a legitimate state interest" and that "its actions are narrowly tailored to meet [that] interest." *Ibid.* (quoting *Crawford*, 194 F.3d at 959).

Whalen and *Nixon* draw much clearer lines. In both cases, the Court distinguished between the collection of information by the government and the dissemination of that information to the public at large, suggesting that any constitutional right to the privacy of information focuses on the latter, not the former. See *Nixon*, 433 U.S. at 456-457; *Whalen*, 429 U.S. at 600-601. Yet the court of appeals stated that it would apply the same balancing test any time the "government's actions compel disclosure of private information," regardless of whether the information was provided to the government or disseminated publicly. Pet. App. 17a-18a.

Further, both *Whalen* and *Nixon* determined that any informational privacy concerns would be substantially lessened by statutory and regulatory protections limiting the public dissemination of information provided to the government. *Nixon*, 433 U.S. at 458-460; *Whalen*, 429 U.S. at 601-602. Here, although the court of appeals stated that "the adequacy of safeguards to prevent unauthorized disclosure" is a factor relevant to the constitutional analysis, Pet. App. 18a (quoting *Doe*, 941 F.2d at 796), the court did not analyze the numerous protections that would protect background-check infor-

mation from public disclosure. Strikingly, the court never so much as mentioned the Privacy Act, even though both SF-85 and Form 42 note its applicability. Nor did the court of appeals address the specific procedures adopted by the Commerce Department and OMB in their guidance on credentialing contract employees. See pp. 29-30, *supra*. Instead, the court dismissively observed that even if "safeguards exist to help prevent disclosure" of the information collected, the government's burden remained the same. Pet. App. 24a. That was error. The distinction between the government's collection of information and public disclosure of information "is critical to this case because the government has provided adequate safeguards to ensure that the information is not disseminated to the public." *Id.* at 117a-118a (Callahan, J., dissenting from denial of rehearing en banc).

The court of appeals also erred by not assessing respondents' claim in light of the special and limited purpose for which the information is collected. Here, the government seeks information not in its regulatory capacity, but in its employment and proprietary capacity. The court of appeals ignored that distinction. See Pet. App. 110a-111a (Callahan, J., dissenting from denial of rehearing en banc); *id.* at 129a (Kozinski, J., dissenting from denial of rehearing en banc). Even assuming that the forms' requests for information might in other circumstances implicate respondents' privacy interests, the court's scrutiny should have taken into account the subject of the inquiries—federal contract employees seeking access to federal facilities.

Similarly, the court of appeals erred in describing the inquiries at issue as "compel[ling]" disclosure of personal information. Pet. App. 22a (emphasis omitted).

Neither an applicant seeking access to federal facilities as a contract employee nor the references the applicant identifies is required to respond to the government's inquiries in the manner that information might be compelled from private persons under regulatory programs. That makes the inquiries much less intrusive than those that are "imposed regardless of * * * consent." *Id.* at 126a-127a (Kozinski, J., dissenting from denial of rehearing en banc).

Finally, the court of appeals should not have equated information obtained directly from the applicant with information obtained from third parties. Pet. App. 17a-18a. When information is obtained from the applicant, and that information concerns core matters that themselves trigger constitutional protections, then a balancing of interests (tailored to the particular context) might in some circumstances be appropriate. See *Nixon*, 433 U.S. at 456. But when information is sought from third parties, it is only the rare case in which a constitutional privacy right would be implicated. As Judge Callahan noted below, until the Ninth Circuit's decision in this case, no court of appeals had held "that individuals have a constitutionally protected right to privacy in information disclosed to [third parties]." Pet. App. 107a (dissenting from denial of rehearing en banc). The everyday interactions that would lead a boss or a landlord to have a view on an applicant's trustworthiness are not the types of "personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected" by the Due Process Clause. *Glucksberg*, 521 U.S. at 727.

In the ordinary course, the fact that an individual has already revealed information to others means that it is

no longer "private" in the constitutional sense. "[B]oth the common law and the literal understandings of privacy encompass the individual's control of information concerning his person"; "the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 763. As this Court has recognized in the Fourth Amendment context, an individual has no expectation of privacy in information she voluntarily reveals to a third party. See, *e.g.*, *Smith* v. *Maryland*, 442 U.S. 735, 743-744 (1979); *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Hoffa* v. *United States*, 385 U.S. 293, 302-303 (1966). That is because once the individual voluntarily discloses information to another, she necessarily assumes the risk that the other person will disclose the information to the government. *Smith*, 442 U.S. at 744-745. That principle applies even when information is revealed to the third party "on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Miller*, 425 U.S. at 443.

2. In light of the very narrow privacy interests at issue here, as well as the government's substantial needs as a public employer, it is not surprising that the Ninth Circuit stands alone in suggesting constitutional infirmity with the NACI background-check process.

Both the D.C. Circuit and the Fifth Circuit have rejected privacy-based challenges to SF-85P and SF-86, even though those forms are more extensive than the one at issue here. In *AFGE* v. *HUD*, *supra*, the D.C. Circuit upheld the questions on SF-85P (the form for public-trust employees) and SF-86 (the form for national security positions) concerning prior illegal activity, drug

use, and bankruptcies; delinquent financial obligations; and mental health treatment. 118 F.3d at 788-790. The court did not decide whether the Constitution protected the information, but held that even assuming that it did, a public employee's interest "is significantly less important where the information is collected by the government but not disseminated publicly," and where the government had "presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusions into [its] employees' privacy." *Id.* at 793-794.

In *NTEU* v. *United States Dep't of the Treasury*, *supra*, the Fifth Circuit similarly rejected a challenge to the question on SF-85P about illegal drug use within the past five years, including its inquiry about "any treatment or counseling received." 25 F.3d at 239-240. The court held that the plaintiffs "ha[d] no reasonable expectation that they can keep [this information] confidential from their government employer." *Id.* at 244. The court also noted that the information collected was never disclosed publicly, and that collecting the information furthered the government's interests in ensuring the trustworthiness of its employees. *Id.* at 243-244.

3. In opposing certiorari, respondents made little attempt to defend the court of appeals' analysis, instead speculating that the government might use the information it receives in the background-check process to make credentialing decisions based on improper criteria, such as private sexual activity. The principal basis for that claim was an "issue characterization chart," allegedly downloaded from a JPL intranet site, which respondents assert was used to identify criteria for employment decisions. Br. in Opp. 7, 16, 19-20; see Br. in Opp. App. 4a-10a (chart).

Both the district court and the court of appeals held that this challenge was "unripe and unfit for judicial review," because the government had not even begun the background checks of respondents and the record "does not sufficiently establish" how the government makes credentialing decisions. Pet. App. 8a-9a, 61a-63a. Respondents have not challenged that determination before this Court, and therefore the issue is not before the Court.

Nonetheless, because respondents pressed the point in opposing certiorari, the government notes that it has never claimed the authority to make credentialing determinations on criteria unrelated to employment, Pet. 9 n.5, and that NASA does not use the "issue characterization chart" to decide whether to provide credentials to federal contract employees, Cert. Reply 10. Further, OPM has recently issued a notice to all federal agencies, including NASA, reiterating that OPM has promulgated the exclusive standards for agencies to use in credentialing contract employees—standards that do not include respondents' "issue characterization chart." See OPM, *Federal Investigations Notice No. 10-05, Reminder to Agencies of the Standards for Issuing Identity Credentials Under HSPD-12* (May 17, 2010), http://www.opm.gov/investigate/fins/2010/fin10-05.pdf. Finally, there are federal prohibitions on employment discrimination that preclude decisionmaking on the bases that respondents suggest. See, *e.g.*, Exec. Order No. 13,087, 3 C.F.R. 191 (1998 Comp.) (amending Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Comp.)); see also 5 U.S.C. 2302(b)(10) (prohibiting the federal government from discriminating against employees or applicants on the basis of conduct that does not affect their work performance or the performance of others).

NASA's actual experience with its background checks belies any contention that it will make credentialing decisions based on improper factors. Although approximately 39,000 NASA contract employees had completed the requisite background investigations as of September 21, 2007, J.A. 224, respondents have not identified any example of an investigator seeking improper information, nor have they shown that anyone was denied a credential based on the use of improper criteria. See J.A. 213 (although over 46,000 individuals have applied for identity credentials, there have been no "reports * * * of any of the types of improper investigative techniques [respondents] suggest"). Respondents' baseless speculation on an issue not before this Court cannot justify the injunction issued by the court of appeals. The Constitution does not prohibit the federal government from making routine, employment-related inquiries regarding persons who wish to work as contract employees at the Nation's leading space and robotics research center.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

The Privacy Act, 5 U.S.C. 552a, provides, in pertinent part:

Records maintained on individuals

(a) DEFINITIONS.—For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e)[1] of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or

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[1] See References in Text note below.

other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

* * * * *

(b) CONDITIONS OF DISCLOSURE.—No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

(c) ACCOUNTING OF CERTAIN DISCLOSURES.—Each agency, with respect to each system of records under its control, shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency

in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) ACCESS TO RECORDS.—Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency

or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) AGENCY REQUIREMENTS.—Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;

(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and

(D) the effects on him, if any, of not providing all or any part of the requested information;

(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register upon

establishment or revision a notice of the existence and character of the system of records, which notice shall include—

(A) the name and location of the system;

(B) the categories of individuals on whom records are maintained in the system;

(C) the categories of records maintained in the system;

(D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;

(E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;

(F) the title and business address of the agency official who is responsible for the system of records;

(G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;

(H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and

(I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any indi-

vidual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against

any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained;

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency; and

(12) if such agency is a recipient agency or a source agency in a matching program with a non-Federal agency, with respect to any establishment or revision of a matching program, at least 30 days prior to conducting such program, publish in the Federal Register notice of such establishment or revision.

(f) AGENCY RULES.—In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the

agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records, pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall biennially compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) CIVIL REMEDIES.— Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the

production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause

of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

* * * * *

(i)(1) CRIMINAL PENALTIES.—Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e)(4) of this section shall be guilty of a misdemeanor and fined not more than $5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000.

* * * * *

RESPONDENT'S BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, *et al.*,

Petitioners,

v.

ROBERT M. NELSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that respondents have raised serious questions going to the merits of their informational privacy claim, based on NASA's decision to institute background investigations of low-risk, long-time employees of the California Institute of Technology (which operates the Jet Propulsion Laboratory under a contract with NASA), where that investigation could delve into (1) confidential details about medical treatment or counseling for past drug use, and (2) any "adverse" information about the employee, including private sexual matters.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

STATEMENT 1

A. Respondents' Work At JPL 1

B. NASA's New Background Investigations 4

C. Proceedings Below 8

SUMMARY OF ARGUMENT 11

ARGUMENT 15

I. RESPONDENTS HAVE RAISED SERIOUS QUESTIONS WHETHER NASA'S BACKGROUND INVESTIGATION VIOLATES THEIR CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY 15

A. The Right To Avoid Disclosure Of Highly Personal Matters Is Well Established 16

B. The SF-85's Demand For Details About Drug Treatment Or Counseling Implicates Sensitive Personal Matters Protected By The Right To Informational Privacy 20

1. Details about drug treatment or counseling are highly sensitive personal matters normally treated as private 20

TABLE OF CONTENTS—Continued

Page

2. NASA has provided no justification for compelling respondents to disclose "details" of medical treatment or counseling for past drug abuse 25

C. NASA's Unbounded Inquiry Into Respondents' "Suitability" Also Potentially Implicates Sensitive Personal Matters 28

1. Respondents' right to informational privacy is implicated because NASA has refused to disavow consideration of private sexual matters as part of its suitability determination 29

2. NASA has failed to provide a legitimate government interest that would justify delving into sensitive private matters 33

II. THE GOVERNMENT'S REMAINING ARGUMENTS LACK MERIT 35

A. The Right To Privacy Is Implicated By Government Collection, As Well As Dissemination, Of Sensitive Personal Information 36

1. Neither *Whalen* nor *Nixon* limited the informational privacy right to public dissemination of private matters 36

TABLE OF CONTENTS—Continued

Page

2. A bright line between collection of private information and its public dissemination would ignore significant harms to important privacy interests 40

B. The Privacy Act Does Not Sufficiently Protect Respondents' Sensitive Personal Information 43

C. The Government's Interests As Employer And Proprietor Do Not Automatically Outweigh Respondents' Privacy Rights 46

1. The government cannot justify its background investigation based on its interests as an employer 46

2. The government also cannot justify its background investigation based on its ownership of JPL facilities 52

D. Respondents Do Not Lose All Privacy Interests In Information Shared With Third Parties 53

E. Respondents Are Not Voluntarily Surrendering Their Private Information 56

CONCLUSION 57

TABLE OF AUTHORITIES

CASES

Page(s)

ACLU of Mississippi v. *Mississippi*, 911 F.2d 1066 (5th Cir. 1990) 39

Aid for Women v. *Foulston*, 441 F.3d 1101 (10th Cir. 2006) 39

Alexander v. *Peffer*, 993 F.2d 1348 (8th Cir. 1993) 17, 18

Alpha Medical Clinic v. *Anderson*, 128 P.3d 364 (Kan. 2006) 17

American Federation of Government Employees v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997) 17, 19, 47

American Federation of Government Employees v. *United States Railroad Retirement Board*, 742 F. Supp. 450 (N.D. Ill. 1990) 39

Bloch v. *Ribar*, 156 F.3d 673 (6th Cir. 1998) 18, 31

Board of County Commissioners v. *Umbehr*, 518 U.S. 668 (1996) 46, 56

Borucki v. *Ryan*, 827 F.2d 836 (1st Cir. 1987) 16

Boyd v. *United States*, 116 U.S. 616 (1886) 41

Butler v. *Curry*, 528 F.3d 624 (9th Cir. 2008) 26

California Bankers Ass'n v. *Shultz*, 416 U.S. 21 (1974) 18

Carey v. *Population Services, International*, 431 U.S. 678 (1977) 30

Cell Associates, Inc. v. *NIH*, 579 F.2d 1155 (9th Cir. 1978) 44

TABLE OF AUTHORITIES—Continued

Page(s)

Cole v. *Young*, 351 U.S. 536 (1956) 48

Collings v. *Longview Fibre Co.*, 63 F.3d 828 (9th Cir. 1995) 28

Cooper v. *FAA*, 596 F.3d 538 (9th Cir. 2010) 45

Denius v. *Dunlap*, 209 F.3d 944 (7th Cir. 2000) ..... *passim*

DiMura v. *FBI*, 823 F. Supp. 45 (D. Mass. 1993) 45

Doe v. *Attorney General*, 941 F.2d 780 (9th Cir. 1991) 18

Doe v. *Broderick*, 225 F.3d 440 (4th Cir. 2000) 24

Doe v. *Chao*, 540 U.S. 614 (2004) 44

Doe v. *City of New York*, 15 F.3d 264 (2d Cir. 1994) 21

DuPlantier v. *United States*, 606 F.2d 654 (5th Cir. 1979) 19

Eagle v. *Morgan*, 88 F.3d 620 (8th Cir. 1996) 16

Eastwood v. *Department of Corrections*, 846 F.2d 627 (10th Cir. 1988) 18, 31, 34, 39

Eisenbud v. *Suffolk County*, 841 F.2d 42 (2d Cir. 1988) 18, 19

Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 42

Ellison v. *Cocke County*, 63 F.3d 467 (6th Cir. 1995) 24

FW/PBS, Inc. v. *City of Dallas*, 493 U.S. 215 (1990) 25

TABLE OF AUTHORITIES—Continued

Page(s)

Fitzpatrick v. *IRS*, 665 F.2d 327 (11th Cir. 1982) 44

Fraternal Order of Police, Lodge 5 v. *City of Philadelphia*, 812 F.2d 105 (3d Cir. 1987) 16, 17, 18, 21

Garcetti v. *Ceballos*, 547 U.S. 410 (2006) 49

Greene v. *McElroy*, 360 U.S. 474 (1959) 47, 48

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 36, 55

Gruenke v. *Seip*, 225 F.3d 290 (3d Cir. 2000) 39

Hawaii Psychiatric Society v. *Ariyoshi*, 481 F. Supp. 1028 (D. Haw. 1979) 39

Heartview Foundation v. *Glaser*, 361 N.W.2d 232 (N.D. 1985) 23

Hester v. *City of Milledgeville*, 777 F.2d 1492 (11th Cir. 1985) 17

Hudson v. *Reno*, 130 F.3d 1193 (6th Cir. 1997) 44

In re Crawford, 194 F.3d 954 (9th Cir. 1999) 19

In re Inquiry Concerning Honorable Lawrence Agerter, 353 N.W.2d 908 (Minn. 1984) 17

Jaffee v. *Redmond*, 518 U.S. 1 (1996) 22

James v. *Potter*, 488 F.3d 397 (6th Cir. 2007) 28

Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 49

Lambert v. *Hartman*, 517 F.3d 433 (6th Cir. 2008) 16, 18

Lawrence v. *Texas*, 539 U.S. 558 (2003) 42, 55

TABLE OF AUTHORITIES—Continued

Page(s)

Lefkowitz v. *Turley*, 414 U.S. 70 (1973) 56

Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990) 32

Mangels v. *Pena*, 789 F.2d 836 (10th Cir. 1986) 17, 18, 19

Martinelli v. *District Court*, 612 P.2d 1083 (Colo. 1980) 17

Montana Shooting Sports Ass'n v. *State*, 224 P.3d 1240 (Mont. 2010) 17

National Treasury Employees Union v. *United States Department of Treasury*, 25 F.3d 237 (5th Cir. 1994) 47

Nixon v. *Administrator of General Services*, 433 U.S. 425 (1977) ..... *passim*

Norman-Bloodsaw v. *Lawrence Berkeley Laboratory*, 135 F.3d 1260 (9th Cir. 1998) 17

O'Connor v. *Ortega*, 480 U.S. 709 (1987) 49

O'Hare Truck Service, Inc. v. *City of Northlake*, 518 U.S. 712 (1996) 46, 56

Olmstead v. *United States*, 277 U.S. 438 (1928) 36

Painting Industry of Hawaii Market Recovery Fund v. *Alm*, 746 P.2d 79 (Haw. 1987) 17

Peninsula Counseling Center v. *Rahm*, 719 P.2d 926 (Wash. 1986) 17

Planned Parenthood of Southern Arizona v. *Lawall*, 307 F.3d 783 (9th Cir. 2002) 39

TABLE OF AUTHORITIES—Continued

Page(s)

Plante v. *Gonzalez*, 575 F.2d 1119 (5th Cir. 1978) 16, 40

Pope v. *Bond*, 641 F. Supp. 489 (D.D.C. 1986) 44

Rankin v. *McPherson*, 483 U.S. 378 (1987) 50

Rosen v. *Lawson-Hemphill, Inc.*, 549 F.2d 205 (1st Cir. 1976) 32

Shaktman v. *State*, 553 So. 2d 148 (Fla. 1989) 17

Shelton v. *Tucker*, 364 U.S. 479 (1960) 42, 50

Stanley v. *Georgia*, 394 U.S. 557 (1969) 36, 41

Statharos v. *New York City Taxi & Limousine Commission*, 198 F.3d 317 (2d Cir. 1999) ... 16, 18, 19

Sullivan v. *River Valley School District*, 197 F.3d 804 (6th Cir. 1999) 27

Thorne v. *City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) 18, 34

Tucson Woman's Clinic v. *Eden*, 379 F.3d 531 (9th Cir. 2004) 16, 18

Uniformed Sanitation Men Ass'n v. *Commissioner of Sanitation*, 392 U.S. 280 (1968) 15, 56

United States Department of Justice v. *Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989) 14, 39, 40, 54

United States ex rel. Chandler v. *Cook County*, 277 F.3d 969 (7th Cir. 2002) 24

United States v. *Cresta*, 825 F.2d 538 (1st Cir. 1987) 24

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Eide*, 875 F.2d 1429 (9th Cir. 1989) 24

United States v. *National Treasury Employees Union*, 513 U.S. 454 (1995) 49

United States v. *Westinghouse Electric Corp.*, 638 F.2d 570 (3d Cir. 1980) 17, 18, 21

Walls v. *City of Petersburg*, 895 F.2d 188 (4th Cir. 1990) 16, 18

Whalen v. *Roe*, 429 U.S. 589 (1977) ..... *passim*

Wieman v. *Updegraff*, 344 U.S. 183 (1952) 49, 56

STATUTES

5 U.S.C. § 552a 5, 43, 44

15 U.S.C. § 1681 51

Federal Information Security Management Act of 2002, 40 U.S.C. § 11331 48

42 U.S.C. § 290dd-2 23

National Aeronautics and Space Act of 1958, 42 U.S.C. §§ 2455 *et seq.* 48

5 C.F.R. § 731.103 6

29 C.F.R.
§ 1630.2 27
§ 1630.3 27
§ 1630.13 27

42 C.F.R. § 2.3 24

Alaska Stat. § 39.26.010 51

TABLE OF AUTHORITIES—Continued

Page(s)

Cal. Health & Safety Code § 11845.5 24

Haw. Rev. Stat. § 378-2.7 51

830 Ill. Comp. Stat. 55/1-20 51

N.Y. Lab. Law § 201-d 51

S.D. Codified Laws § 19-13-7 23

2009 Wash. Rev. Code § 19.182.020 51

RULES

Ark. R. Evid. 503 22

Del. R. Evid. 503 22

Me. R. Evid. 503 23

N.M. R. Evid. 11-504 23

EXECUTIVE MATERIALS

Executive Order No. 10865 (1960) 48

Executive Order No. 12986 (1995) 48

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 92-920 (1972) 23

OTHER AUTHORITIES

Barada, Paul William & Michael McLaughlin, *Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business, and Your Family* (2004) 51

TABLE OF AUTHORITIES—Continued

Page(s)

Benn, Stanley I., *Privacy, Freedom and Respect for Persons* (1971), reprinted in *Philosophical Dimensions of Privacy: An Anthology* 231 (Schoeman ed. 1984) 41

Coles, Todd Robert, *Does the Privacy Act of 1975 Protect Your Right to Privacy?*, 40 Am. U.L. Rev. 957 (1991) 44

Defense Industrial Personnel Security Clearance Review Program (Jan. 2, 1992, updated Apr. 20, 1999) 48

Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992, updated Apr. 20, 1999) 48

Dickinson, Philip D., *Hiring Smart: How to Conduct Background Checks* (1997) 51

EEOC Notice No. 915.002, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* (July 2000) 27

Geppert, Cynthia M.A. & Michael P. Bogenschutz, *Ethics in Substance Use Disorder Treatment*, 32 Psychiatric Clinics of N. Am. 283 (2009) 21

TABLE OF AUTHORITIES—Continued

Page(s)

Homeland Security Presidential Directive/HSPD 12—Policy for a Common Identification Standard for Federal Employees and Contractors, 2 Pub. Papers 1765-1767 (Aug. 27, 2004) 4, 5

Kreek, Mary Jeanne & Marc Reisinger, *The Addict as a Patient*, in *Substance Abuse: A Comprehensive Textbook* 822 (Lowinson et al. eds., 1997) 21

McNamara, Robert M., Jr. & Joyce R. Starr, *Confidentiality of Narcotic Addict Treatment Records: A Legal and Statistical Analysis*, 73 Colum. L. Rev. 1579 (1973) 21

Miller, Arthur R., *Computers, Data Banks and Individual Privacy: An Overview*, 4 Colum. Hum. Rts. L. Rev. 1 (1972) 42

Muller, Max, *The Manager's Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need to Know* (2009) 51

NASA Interim Directive, NPR-1600.1, "Office of Security and Program Protection: Personal Identification Verification (PIV) Policy and Procedure" (May 24, 2007) 8

NASA, *JPL 101* (2002) 52

Parker, Katharine & Daniel Saperstein, 16 No. 4 HR Advisor: Legal & Practice Guideline (2010) 51

TABLE OF AUTHORITIES—Continued

Page(s)

Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971 (1975) 41

Rehnquist, William H., *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1 (Sept. 26-27, 1974) 54

United States Government Accountability Office, GAO-10-4, *NASA Needs to Remedy Vulnerabilities in Key Networks* (2009) 45

United States Government Accountability Office, GAO-07-737, *Personal Information: Data Breaches are Frequent, but Evidence of Resulting Identity Theft Is Limited; However, the Full Extent Is Unknown* (2007) 45

Whitman, James Q., *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L.J. 1151 (2004) 41

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

STATEMENT

A. Respondents' Work At JPL

This case arises from the decision by the National Aeronautics and Space Administration ("NASA") to institute—for the first time in more than 50 years of operation—background investigations of long-time employees of the California Institute of Technology ("Caltech") who work at the Jet Propulsion Laboratory ("JPL"). Caltech is a non-profit educational institution and one of the premier research institutes in the world. Pet. App. 56a. JPL is an operating division of Caltech, staffed entirely by Caltech employees, whose compen-

sation and benefit policies are established by Caltech. J.A. 70. Since 1959, one year after Congress created NASA, Caltech has operated JPL as a Federally Funded Research and Development Center under a contract with NASA. *Id.* at 164. The laboratory's physical facilities are owned by NASA. *Id.*

Respondents are 28 scientists, engineers, and administrative personnel who work at JPL. Pet. App. 56a. They are not employees of the federal government, and they are not job applicants. They are employees of Caltech, and most have been employed by Caltech at JPL for more than 20 years. *Id.*; C.A. App. 812. They do not work on projects that are classified or related to national security, or otherwise restricted from the scientific community and the public. Pet. App. 3a, 24a; J.A. 59, 71. In fact, many of them chose to work at JPL precisely because it offers a research environment where their work is in the public domain. *E.g.*, C.A. App. 1391. Consequently, their work is largely theoretical or research-oriented, and they are part of the wider academic and scientific community, collaborating with other scientists and engineers around the world, publishing in peer-reviewed journals, and teaching at universities. *E.g.*, *id.* at 1359.

JPL has a distinct identity reflecting its mission and culture. Because it operates as a division of Caltech, which hires and provides all of JPL's employees (Pet. App. 56a), "JPL has always operated more as a university campus type environment than as a high-security government facility[.]" J.A. 227. Unlike the other nine NASA centers around the country, JPL has no NASA employees at all. *Id.* at 222; Pet. App. 3a.

Because of the nature of respondents' work, NASA has classified them as "low risk." Pet. App. 3a. That

means that, in NASA's own judgment, even if respondents "misused" their responsibilities or authorities at JPL, it would have "limited to no adverse impact on the Agency's mission." C.A. App. 587. Respondents are "low risk," according to criteria developed by NASA to evaluate the risk factor for each JPL employee, because they do not work on classified material, do not have root access to a mission ground data system, are not involved with the design of mission information technology system security, and do not have unsupervised ability to send commands to spacecraft. *Id.* at 735. Much of respondents' work involves mathematical analysis of data or theoretical calculations, using software in the public domain and requiring nothing more than "a desk, a computer, a pencil, a sheet of paper, and a calculator." *Id.* at 1434. Several respondents are pure research scientists, who have no direct contact with any of the vehicles or hardware created or operated by JPL. *Id.* at 812. For example, Dr. Peter Eisenhardt is an astrophysicist who studies the evolution of galaxies (*id.* at 1400-1401); Dr. Varoujan Gorjian is an astrophysicist who studies star formation history of the universe (*id.* at 1413); Dr. Konstantin Penanen is a physicist who studies quantum fluids (*id.* at 1287); Dr. Paul Weissman studies asteroids and comet orbits (*id.* at 1491); Dr. Amy Hale studies Mars atmospheric and polar studies (*id.* at 1423); and Dr. Josette Bellan conducts research in the field of chemically reactive turbulent flows (J.A. 188).

Respondents, like all those who work at JPL, were hired by Caltech and were vetted by Caltech for initial employment through standard criminal background checks and employment reference checks. *E.g.*, Pet. App. 79a; C.A. App. 1397. NASA has never previously required any additional background checks on

JPL employees. Pet. App. 5a. NASA has never suggested in this case that additional background investigations into Caltech employees at JPL were necessary because of any risk of harm to NASA's operations created by any JPL employee. Nor has NASA suggested in this case that the standard background check carried out by Caltech into applicants for employment at JPL had failed to identify any individual who posed a risk to NASA or was otherwise unsuitable.

B. NASA's New Background Investigations

NASA recently decided to institute a background investigation of its contractors' employees to determine their "suitability" to continue to work at JPL and other such facilities. NASA thus required all employees at JPL (including persons who had been employed there for decades) to undergo the National Agency Check with Inquiries ("NACI"), which is the background check used for federal civil service employees. Pet. App. 5a. NASA implemented the change at JPL in 2007, when it unilaterally modified its contract with Caltech—over Caltech's opposition—to require all JPL employees to undergo the NACI. *Id.* at 3a, 5a. Employees who do not complete the NACI "would be deemed to have voluntarily resigned their Caltech employment." *Id.* at 6a.

There is no legal requirement that NASA conduct background investigations into its contractors' employees. The government states (Pet. Br. 7-9) that NASA imposed the NACI on contractors' employees to comply with a presidential directive that requires federal agencies to adopt a uniform standard of identification for civil service and contract employees who have access to federal facilities. *See* Homeland Security Presidential Directive/HSPD 12—Policy for a Common Identifica-

tion Standard for Federal Employees and Contractors, 2 Pub. Papers 1765-1767 (Aug. 27, 2004) ("HSPD-12") (reprinted at J.A. 127-130). HSPD-12, however, directs agencies to ensure that the *identity* of employees and contractors at federal facilities can be reliably verified. *See id.*; Pet. 6; Pet. App. 82a n.9. Nowhere does HSPD-12 mention or authorize background investigations.

The NACI investigation to determine "suitability" for employment consists of three steps. First, the subject individual must complete a Standard Form 85 ("SF-85"). J.A. 88-95. In addition to requesting standard background information, such as employment and educational history, as well as three references, the SF-85 directs the respondent to provide "details" of any illegal drug use over the past year, including details of any drug-related treatment or counseling. *Id.* at 94. The form also requires the subject individual to sign a release authorizing the government to collect an expansive range of information from other sources. Based on the release, the government can "obtain any information" from schools, landlords, employers, businesses, "or other sources of information." *Id.* at 95. That information "may include, but is not limited to ... academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information." *Id.* Although SF-85 states that the information will be covered by the federal Privacy Act, 5 U.S.C. § 552a, it also explains that any such information may be "routine[ly]" disclosed "without your consent" to the news media or the general public, Congress, the courts, and "any source or potential source from which information is requested in the course of [the background] investigation." J.A. 89. NASA submits the completed SF-85 to the Office of

Personnel Management (OPM), which conducts the background investigation. Pet. 8; J.A. 225.

Second, OPM sends each of the subject individual's references, employers, and landlords a Form 42 ("Investigative Request for Personal Information") or similar form. Pet. 8; J.A. 96-97. Form 42 on its face is intended to be used "in completing a background investigation to help [the government] determine [a] person's suitability for employment or security clearance"—neither of which is at issue here (since respondents are not government employees and do not work with classified information requiring security clearances). *Id.* at 97. The form asks the reference unbounded questions about the subject individual's character. Specifically, the form requests whether the reference has "any adverse information about this person's employment, residence, or activities concerning" violations of law, financial integrity, abuse of alcohol and/or drugs, mental or emotional stability, general behavior or conduct, "or other matters." The reference may "discuss the adverse information I have." Alternatively, the form provides space for the reference to write any information "which you feel may have a bearing on this person's suitability for government employment," including "derogatory as well as positive information." *Id.*

Third, NASA will examine the information collected in OPM's investigation, and NASA will then determine whether the individual is "suitable" for access to NASA facilities, and therefore for continued employment at JPL. Pet. App. 4a-5a. The assessment of "suitability" is left to NASA's discretion. *See id.* at 82a (citing 5 C.F.R. § 731.103(a) ("[OPM] delegates to the heads of agencies authority for making suitability determinations and taking suitability actions.")).

After concerned JPL employees asked what criteria NASA would use to determine their "suitability," NASA management posted a "suitability matrix" on its website. Pet. App. 5a n.2; J.A. 235; C.A. App. 1487; *see* J.A. 98-104. This matrix is titled "Issue Characterization Chart" and lists various factors, reflecting criteria to be used by NASA in determining suitability. Those factors include, among others, carnal knowledge, sodomy, indecent exposure, voyeurism, obscene telephone calls, indecent proposals, incest, bestiality, homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. *Id.*; Pet. App. 5a n.2.

In the lower courts, NASA consistently refused to deny that it will use the factors in the suitability matrix as part of the background investigations to determine suitability. Pet. App. 5a n.2 ("NASA neither concedes nor denies that these factors are considered as part of its suitability analysis[.]"). At an informational meeting on implementation of the NACI, the director of JPL stated that NASA would use the matrix as part of the NACI background investigations to determine suitability. J.A. 203, 234-235.

Finally, in the event that NASA, as a result of this process, deems any Caltech employee "unsuitable"—meaning in effect that the employee would be denied a badge for access to JPL and would therefore lose his position at Caltech—the employee has very limited procedural rights. Persons who are deemed unsuitable to have a badge permitting access to JPL do not receive a statement of reasons for that determination, are not entitled to any form of adversarial hearing before an adjudicative officer, have no right to discovery, cannot confront or cross-examine witnesses, have no right to a public tribunal to resolve their case, and have no

right of appeal outside the decisionmaking body. *See* NASA Interim Directive, NPR-1600.1, "Office of Security and Program Protection: Personal Identification Verification (PIV) Policy and Procedure" (May 24, 2007) (J.A. 180-183).

C. Proceedings Below

Respondents sued NASA, arguing, as relevant here, that NASA's recently adopted requirement that individuals like themselves—current Caltech employees in low-risk positions at JPL—submit to NACI background investigations violated their constitutional right to informational privacy. The district court denied a preliminary injunction. Viewing the privacy claim in two parts, one part challenging SF-85 and the other challenging NASA's suitability matrix (Pet. App. 62a), the district court first determined that the challenge to SF-85 was ripe because it was "undisputed" that if respondents did not complete SF-85, they would "be deemed to have voluntarily resigned." *Id.* at 63a. However, the court determined that the challenge to the suitability matrix, which had not yet been used to find any specific individual "unsuitable," was unripe. *Id.*

The court then concluded that respondents were unlikely to succeed on their claim that SF-85, by itself, was unconstitutional. The court held that SF-85's questions were "relatively non-intrusive." Pet. App. 70a. The court also held that SF-85's release was narrowly tailored to two legitimate interests: "'enhancing security' at federal facilities" and "[v]erifying the identity of federal contractors." *Id.* at 71a. The district court did not address respondents' argument that the background investigation as a whole—the SF-85, with its release authorizing the government to collect "any in-

formation," together with Form 42's broad and open-ended questions and the "suitability matrix" that apparently informs all those inquiries—is unconstitutional. *Id.* at 10a, 26a.

The court of appeals reversed and granted a preliminary injunction. The court concluded that a preliminary injunction was warranted because respondents had "raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor." Pet. App. 29a.

The court first made clear that the district court had erred in construing respondents' challenge. The district court had erroneously "limit[ed] its analysis to the SF-85 questionnaire," and had thus "failed to consider the most problematic aspect of the government's investigation—the open-ended Form 42 inquiries," which are posed against the backdrop of the suitability matrix. Pet. App. 17a, 25a.

The court of appeals then described the legal framework for assessing the informational privacy claim. The court recognized that the right to informational privacy, as developed in the lower courts following this Court's decisions in *Whalen* v. *Roe*, 429 U.S. 589 (1977), and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), "protects an individual interest in avoiding disclosure of personal matters" such as sexual activity, medical information, and financial matters. Pet. App. 17a-18a (internal quotation marks and citations omitted). Under those decisions, the government may "compel disclosure of [such] information" if it establishes "that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Id.* at 18a (internal quotation marks omitted).

Applying this framework, the court first concluded that most of SF-85 was "unproblematic" (Pet. App. 19a), including the question about the subject individual's illegal drug use over the past year, which the court found narrowly tailored to the government's "strong stance in its war on illegal drugs" (*id.* at 21a). But the court determined that there were "serious questions" about two aspects of the investigation: SF-85's inquiry into details of drug treatment or counseling, and Form 42's unbounded scope. The court observed that SF-85's question requiring subject individuals to disclose details of drug treatment or counseling fell "squarely within the domain protected by the constitutional right to informational privacy." *Id.* at 22a. Yet "the government ha[d] not suggested any legitimate interest in requiring the disclosure of such information." *Id.* Thus, the court concluded that, at this early stage of the litigation, there was a serious question whether this "narrow" aspect of SF-85 could survive respondents' constitutional challenge. *Id.*

With respect to Form 42, the court similarly concluded that the government had thus far, at the initial stage of litigation, failed to justify the broad scope of inquiry. Form 42's "broad, open-ended questions" and its solicitation of "*any* adverse information" appeared "designed to elicit a wide range" of information, potentially including information about private sexual matters, such as to "seemingly implicate the right to informational privacy." Pet. App. 22a, 25a. The information sought "range[d] far beyond" the scope of the government's posited "legitimate reasons for investigating its contractors" (including "verifying" their identities and "ensuring the security" of JPL's facilities (*id.* at 24a-25a)). Moreover, the court observed that the government had "steadfastly refused to provide any standards

narrowly tailoring the investigations to the[se] legitimate interests" (*id.* at 26a), including refusing to disavow that the background investigation would involve inquiry into private sexual matters, as reflected in the suitability matrix (*id.* at 5a n.2, 25a).

The court of appeals recognized that the record in this case (which has not even entered the discovery phase) is still undeveloped on several key points, including the extent to which and manner in which the government would gather information, the exact role of the suitability matrix, the nature of any security risk thought to be posed by respondents, the standards governing the Form 42 inquiries, and the extent to which the information collected would be disclosed to anyone, including respondents' employer, Caltech. *See* Pet. App. 4a, 5a n.2, 22a, 24a, 25a. The court concluded, nonetheless, that the balance of hardships "tips sharply toward [respondents], who face a stark choice—either violation of their constitutional rights or loss of their jobs." *Id.* at 26a. By contrast, NASA had not demonstrated any irreparable harm that would flow from retaining respondents in their current positions (without the additional background check) during the pendency of the litigation, given that "JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958." *Id.* at 27a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly concluded that a preliminary injunction was warranted here because two aspects of NASA's background investigation for low-risk employees at JPL raised serious questions going to the merits of respondents' informational privacy claim: SF-85's requirement that respondents disclose

detailed information about drug treatment or counseling, and the investigation's potentially overbroad scope. This Court recognized more than 30 years ago that the constitutional right to informational privacy encompasses "the individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977); *accord Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977). Since those cases were decided, a broad consensus has developed in the lower courts as to both the scope of the right and the level of scrutiny required: the right protects sensitive personal information, including medical information, personal financial information and information about private sexual matters; and informational privacy claims merit heightened scrutiny.

The court of appeals, in keeping with this broad consensus among the lower courts, concluded that compelled disclosure of confidential medical or psychotherapy information, such as the SF-85's requirement that respondents disclose the details of drug treatment or counseling, implicated their informational privacy rights. As such, the government must show that its interest in obtaining the information is sufficiently weighty to justify that intrusion on respondents' rights. However, the government did not offer the lower courts *any* legitimate interest for requiring respondents to disclose this information (despite ample opportunity to do so) and the government therefore failed to show that its interest outweighed the intrusion on respondents' rights. Accordingly, the court of appeals correctly concluded that serious questions were raised whether this aspect of the SF-85 could survive respondents' constitutional challenge.

The court of appeals also correctly concluded that the government's unbounded inquiries could delve into

respondents' private sexual matters and that the government has shown no legitimate reason for doing so. Although the government contends that its inquiries are limited to routine, employment-related matters, the record refutes that assertion. NASA uses the SF-85 and Form 42 for purposes of determining respondents' "suitability" for access to JPL facilities. In response to questions from JPL employees as to how NASA would determine "suitability," NASA posted a "suitability matrix" on its website. This matrix listed various factors apparently reflecting criteria that NASA would use in determining "suitability," including carnal knowledge, sodomy, homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. Prying into such personal matters would clearly implicate respondents' privacy interests. The government, however, steadfastly refused to deny that it will use the factors in the suitability matrix as part of the background investigations to determine suitability. Pet. App. 5a n.2. Because the government failed to provide any legitimate justification for inquiries that could pry into private sexual matters, the court of appeals correctly concluded that serious questions had been raised whether NASA's background investigation violates respondents' constitutional rights and that the investigations should be preliminarily enjoined pending resolution of the merits of the case.

II. The government argues that, even if NASA's background investigation intrudes into sensitive personal information to a degree not sufficiently justified by the government's legitimate interests, respondents' constitutional rights are nonetheless not implicated. The government offers several reasons for this position, all of which are flawed. First, the government ar-

gues that the right to privacy is only implicated by public dissemination of private information, not compelled disclosure of private information to the government. Contrary to the government's argument, however, neither *Whalen* nor *Nixon* drew such bright-line rules. Indeed, although both cases recognized that the distinction between collection and public dissemination is relevant to assessing the invasion of privacy caused by the government's actions, neither case held that the right to privacy could be implicated only by public dissemination. And the lower courts have understood the right to privacy articulated in *Whalen* and *Nixon* as implicated by intrusive government collection of sensitive private information, even without subsequent public dissemination. The government next argues that respondents' rights are not implicated because the Privacy Act sufficiently guards against dissemination. Not only does the Privacy Act have numerous broad exemptions, but the government fails to mention the serious problem of data breaches of sensitive information held by the government—and by NASA in particular.

The government's argument that its status as employer makes constitutional scrutiny unnecessary is also flawed. Respondents are not government employees—they are employees of Caltech. In any event, government employees do not lose the protections of the Constitution when they take a federal job. The government also argues that respondents have no privacy interest in information shared with another person. This Court has already rejected that argument. *Nixon*, 433 U.S. at 465; *see also United States Dep't of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989). Finally, the government contends that respondents relinquish their rights by seek-

ing to retain their positions. The idea that respondents are voluntarily disclosing information is incorrect—respondents, many of whom have worked at JPL for decades, will lose their jobs if they do not complete the investigation process. Respondents "are entitled, like all other persons, to the benefit of the Constitution," and the government may not force them to choose "between surrendering their constitutional rights or their jobs." *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 284-285 (1968).

ARGUMENT

I. RESPONDENTS HAVE RAISED SERIOUS QUESTIONS WHETHER NASA'S BACKGROUND INVESTIGATION VIOLATES THEIR CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY

This Court has recognized—and the government does not dispute—that the Constitution protects a right to informational privacy: "the individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U.S. 589, 599 (1977); *accord Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977). That right is not unlimited; the government's interests must be balanced against the individual's. The court of appeals issued a preliminary injunction because "serious questions" going to the merits of respondents' informational privacy claim were raised by two aspects of NASA's background investigation for low-risk employees at JPL: SF-85's requirement that respondents disclose detailed information about drug treatment or counseling, and the investigation's potentially overbroad scope. That decision was correct, given that NASA failed to provide any justification for requiring disclosure of drug treatment information or for delving

into other unquestionably private matters when assessing respondents' "suitability."

A. The Right To Avoid Disclosure Of Highly Personal Matters Is Well Established

The government does not dispute that the Constitution protects the right to informational privacy. This Court recognized that right more than thirty years ago in *Whalen*, where the Court explained that the constitutional right to privacy includes "at least two different kinds of interests." 429 U.S. at 599. One is "the interest in independence in making certain kinds of important decisions." *Id.* at 599-600. The other strand of privacy—at issue here—is "the individual interest in avoiding disclosure of personal matters." *Id.* at 599. Soon after *Whalen*, the Court again addressed the right to informational privacy in *Nixon*, reiterating that "[o]ne element of privacy has been characterized as the individual interest in avoiding disclosure of personal matters." 433 U.S. at 457 (internal quotation marks omitted).

In the years following *Whalen* and *Nixon*, every federal court of appeals to have decided the issue has concluded that the Constitution protects a right to informational privacy. *See Borucki* v. *Ryan*, 827 F.2d 836, 839 (1st Cir. 1987); *Statharos* v. *New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999); *Fraternal Order of Police, Lodge 5* v. *City of Philadelphia*, 812 F.2d 105, 109 (3d Cir. 1987); *Walls* v. *City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *Plante* v. *Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978); *Lambert* v. *Hartman*, 517 F.3d 433, 440 (6th Cir. 2008); *Denius* v. *Dunlap*, 209 F.3d 944, 955 (7th Cir. 2000); *Eagle* v. *Morgan*, 88 F.3d 620, 625 (8th Cir. 1996); *Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 551 (9th Cir.

2004); *Mangels* v. *Pena*, 789 F.2d 836, 839 (10th Cir. 1986); *Hester* v. *City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985); *cf. American Fed'n of Gov't Emps.* v. *HUD*, 118 F.3d 786, 793 (D.C. Cir. 1997) ("AFGE") (assuming without deciding that the right exists). Likewise, state courts have acknowledged the right, under either the federal constitution or their own state constitutions. *See, e.g., Alpha Med. Clinic* v. *Anderson*, 128 P.3d 364, 376 (Kan. 2006) (federal constitution); *Peninsula Counseling Ctr.* v. *Rahm*, 719 P.2d 926, 929 (Wash. 1986) (same); *Martinelli* v. *District Ct.*, 612 P.2d 1083, 1091 (Colo. 1980) (same); *In re Inquiry Concerning Honorable Lawrence Agerter*, 353 N.W.2d 908, 913 (Minn. 1984) (same); *Montana Shooting Sports Ass'n* v. *State*, 224 P.3d 1240, 1244 (Mont. 2010) (state constitution); *Shaktman* v. *State*, 553 So. 2d 148, 150 (Fla. 1989) (same); *Painting Indus. of Haw. Mkt. Recovery Fund* v. *Alm*, 746 P.2d 79, 82 (Haw. 1987) (same).

Since *Whalen* and *Nixon*, this Court has not further elaborated on the scope of the informational privacy right or the appropriate level of scrutiny for evaluating alleged violations of that right. In the thirty years since those cases were decided, however, a broad consensus has developed in the lower courts on both points. On the scope of the right, there is broad agreement in the federal circuit courts that the constitutional right to informational privacy protects sensitive personal information, including medical information,[1] per-

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[1] *See United States* v. *Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980); *Denius*, 209 F.3d at 956; *Alexander* v. *Peffer*, 993 F.2d 1348, 1351 (8th Cir. 1993); *Fraternal Order of Police, Lodge 5*, 812 F.2d at 113; *Norman-Bloodsaw* v. *Lawrence Berkeley*

sonal financial information,[2] and information about private sexual matters.[3] There is also broad consensus that informational privacy claims merit heightened scrutiny.[4] This process calls for the "delicate task of weighing competing interests," *United States* v. *Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980). Thus, "courts balance the government's interest in having or using the information against the individual's interest in denying access." *Doe* v. *Attorney General*, 941 F.2d 780, 796 (9th Cir. 1991); *see also Nixon*, 433 U.S. at 459 (finding the invasion of President Nixon's right to privacy to be potentially troubling but balancing the competing interests and concluding that the required intrusion was justified).

Accordingly, the courts of appeals broadly agree that, when sensitive personal information within the

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Lab., 135 F.3d 1260, 1269 (9th Cir. 1998); *Tucson Woman's Clinic*, 379 F.3d at 551.

[2] *See Statharos*, 198 F.3d at 322-323; *Walls*, 895 F.2d at 194; *Plante*, 575 F.2d at 1135; *Denius*, 209 F.3d at 958; *Alexander*, 993 F.2d at 1351; *cf. California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring) ("Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy.").

[3] *See Eastwood* v. *Department of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988); *Mangels*, 789 F.2d at 839; *Thorne* v. *City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983); *Westinghouse*, 638 F.2d at 577. The Sixth Circuit examines whether the information at issue implicates a "fundamental liberty interest," including the "fundamental right of privacy in one's sexual life." *Bloch* v. *Ribar*, 156 F.3d 673, 684 (6th Cir. 1998); *Lambert*, 517 F.3d at 441.

[4] *See, e.g., Eisenbud* v. *Suffolk County*, 841 F.2d 42, 45 (2d Cir. 1988); *Fraternal Order of Police, Lodge 5*, 812 F.2d at 110.

scope of the right is implicated, the government must establish that its interest in obtaining or disclosing the information is sufficiently weighty to justify the intrusion into that personal sphere.[5] The government must also establish that its use of the information will actually further that purpose, such that its intrusion into the personal sphere does not reach beyond the scope necessary to accomplish its legitimate interests.[6] In sum, the circuit courts have long accepted that, when the government seeks to intrude into sensitive personal spheres such as medical, financial, or sexual information, that intrusion requires a heightened justification.

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[5] *See AFGE*, 118 F.3d at 793 (government must demonstrate "sufficiently weighty interests in obtaining the information sought ... to justify the intrusions into their employees' privacy"); *Denius*, 209 F.3d at 956-957 (government employer's interest in obtaining employees' medical information must be sufficiently strong to overcome the intrusion on privacy); *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (government has the burden of showing that its use of private information would advance a legitimate state interest and that its actions are narrowly tailored to meet that interest).

[6] *See Statharos*, 198 F.3d at 323; *Eisenbud*, 841 F.2d at 46 (intrusion on privacy must further a substantial government interest); *DuPlantier* v. *United States*, 606 F.2d 654, 670 (5th Cir. 1979) (government's interest must be "important" and must be "substantially furthered" by the privacy intrusion); *Mangels*, 789 F.2d at 839 (disclosure of protected information is valid only if it "advance[s] a compelling state interest which, in addition, must be accomplished in the least intrusive manner"); *cf. AFGE*, 118 F.3d at 793 (governmental intrusion on privacy is permissible when the government "present[s] sufficiently weighty interests for obtaining the information").

B. The SF-85's Demand For Details About Drug Treatment Or Counseling Implicates Sensitive Personal Matters Protected By The Right To Informational Privacy

The SF-85 asks respondents whether they have "used, possessed, supplied, or manufactured illegal drugs" within the last year. If the respondent answers in the affirmative, he is then required to "provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs." J.A. 94. The Ninth Circuit found that such questions are supported by sufficiently weighty government interests. Pet. App. 21a. The SF-85 goes on, however, to require respondents to provide "details" of "any treatment or counseling received" for such drug use. J.A. 94. The requirement that respondents disclose details of drug treatment or counseling implicates their informational privacy rights both because it relates to intimate health information and because it undermines the confidentiality that such treatment requires. Because the government failed to offer *any* justification to the lower courts for requiring disclosure of such information, the court of appeals correctly concluded that a preliminary injunction against this aspect of NASA's background investigation was warranted.

1. Details about drug treatment or counseling are highly sensitive personal matters normally treated as private

The Ninth Circuit correctly concluded that the information about treatment or counseling for illegal drug use demanded by the SF-85 "falls squarely within the domain protected by the right to informational privacy." Pet. App. 22a. Courts generally agree that in-

formation about medical treatment or psychotherapy is protected by the right to informational privacy. "There can be no question that ... medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection." *Westinghouse*, 638 F.2d at 577.[7]

Medical information is inherently private: it relates to intimate facts about one's body and health. And information regarding treatment or counseling for drug use is particularly sensitive because drug abuse carries a unique stigma in society that—absent confidentiality—could discourage drug abusers from seeking help from a doctor or psychotherapist. *See* Geppert & Bogenschutz, *Ethics in Substance Use Disorder Treatment*, 32 Psychiatric Clinics of N. Am. 283, 284 (2009). Indeed, confidentiality protections for drug-abuse treatment must be "stricter and more protective" than in other areas of medicine and psychiatry. *See id.* Accordingly, the medical and therapy professions have long understood that confidentiality is essential to effective drug-abuse treatment. *See* Kreek & Reisinger, *The Addict as a Patient*, in *Substance Abuse: A Comprehensive Textbook* 822, 830 (Lowinson et al. eds., 1997) (stressing the "fundamental importance to this group of patients" of "the appropriate maintenance of confidentiality"); McNamara & Starr,

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[7] *See also Doe* v. *City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) ("there are few matters that are quite so personal as the status of one's health"); *Fraternal Order of Police, Lodge 5*, 812 F.2d at 113 ("we have repeatedly held that medical information," such as information about drug use or psychological counseling, " is entitled to privacy protection"); *Denius*, 209 F.3d at 956-957 (the right to informational privacy protects confidential medical records).

Confidentiality of Narcotic Addict Treatment Records: A Legal and Statistical Analysis, 73 Colum. L. Rev. 1579, 1585 (1973) ("Without the confidence and trust established by insuring confidentiality, those [drug abusers] who need help most will not ask for it."). Confidentiality is particularly important in the employment context, since discovery of employees' drug-abuse treatment carries a risk of lost job opportunities, in addition to stigmatization and embarrassment.

This Court has also recognized—when determining that the Federal Rules of Evidence include a psychotherapist-patient privilege—that privacy is fundamentally important to psychotherapy:

> Effective psychotherapy ... depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Jaffee v. *Redmond*, 518 U.S. 1, 10 (1996). That logic applies with particular force in the context of drug treatment and counseling because of the added stigma associated with drug abuse and addiction.[8]

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[8] For similar reasons, several states have expressly extended the psychotherapist-patient and physician-patient privileges to drug-treatment information. *See, e.g.*, Ark. R. Evid. 503(b); Del. R.

Congress has recognized the importance of privacy in the drug-therapy setting by broadly prohibiting the disclosure of patient information relating to substance abuse treatment or rehabilitation from any federally funded drug-treatment facility. *See* 42 U.S.C. § 290dd-2(a).[9] Congress enacted this restriction because it understood that "the strictest adherence" to confidentiality is "absolutely essential to the success of all drug abuse prevention programs." H.R. Conf. Rep. No. 92-920, at 33 (1972). As Congress explained, patients "must be assured that [their] right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse ... will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome." *Id.*[10] The courts, in

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Evid. 503(b); Me. R. Evid. 503(b); N.M. R. Evid. 11-504(B); S.D. Codified Laws § 19-13-7. As one court explained, "[i]f patients—former, present, and prospective—are not assured [that] their treatment for drug ... dependency will be confidential, the effectiveness of such rehabilitation will be uncertain. Without the assurance of confidentiality a number of individuals may hesitate to seek treatment in ... drug-treatment programs." *Heartview Found.* v. *Glaser*, 361 N.W.2d 232, 235 (N.D. 1985).

[9] Such records may be disclosed only in very limited circumstances. *See, e.g.*, 42 U.S.C. § 290dd-2(b)(1) (written consent); *id.* § 290dd-2(b)(2)(C) (good cause). Although respondents are required to sign a blanket release as part of the background investigation, such a release cannot constitute voluntary consent to disclosure, given that respondents are required to submit to the investigation, including signing the release, or lose their jobs. *See infra* p. 56.

[10] The Department of Health and Human Services, which has issued regulations implementing this disclosure prohibition, has echoed Congress' privacy concerns: a "drug abuse patient in a federally assisted ... drug abuse program [should not be] made more vulnerable by reason of the availability of his or her patient record

interpreting Section 290dd-2, have recognized that preserving confidentiality of drug-abuse treatment information is important because it will encourage individuals to seek drug therapy; by contrast, allowing unfettered access by government officials to such records will deter those who would otherwise seek treatment.[11]

The Ninth Circuit correctly concluded, therefore, that information regarding drug treatment and counseling falls squarely within the scope of the right to informational privacy. Because NASA's background investigation requires respondents to disclose the "de-

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than an individual who has a[] ... drug problem and who does not seek treatment." 42 C.F.R. § 2.3(b)(2). States also have analogous prohibitions against disclosure of drug-treatment records. *See, e.g.*, Cal. Health & Safety Code § 11845.5(a).

[11] *See Doe* v. *Broderick*, 225 F.3d 440, 450-451 (4th Cir. 2000) (concluding, under a Fourth Amendment analysis, that Section 290dd-2 is "a fitting indication that society is willing to recognize [a person's] expectation of privacy [in drug treatment or counseling records] as objectively reasonable" because "medical treatment records contain intimate and private details that people do not wish to have disclosed, expect will remain private, and, as a result, believe are entitled to some measure of protection from unfettered access by government officials"); *see also United States ex rel. Chandler* v. *Cook County*, 277 F.3d 969, 981 (7th Cir. 2002) ("Patients will be less willing to seek treatment if patient confidentiality is not strictly protected."); *Ellison* v. *Cocke County*, 63 F.3d 467, 471 (6th Cir. 1995) ("confidentiality of medical records maintained in conjunction with drug treatment programs [i]s essential"); *United States* v. *Eide*, 875 F.2d 1429, 1437 (9th Cir. 1989) (allowing disclosure of drug treatment information would "discourage people from seeking professional help for their ... drug problems"); *United States* v. *Cresta*, 825 F.2d 538, 552 (1st Cir. 1987) ("The express purpose of this provision is to encourage patients to seek treatment for substance abuse without fear that by so doing, their privacy will be compromised.").

tails" of such protected information, this aspect of the background investigation implicates the constitutional right to informational privacy. Accordingly, the government must show that its interest in obtaining the information is sufficiently weighty to justify the intrusion on that right.

2. NASA has provided no justification for compelling respondents to disclose "details" of medical treatment or counseling for past drug abuse

Despite ample opportunity to do so, the government did not offer the lower courts *any* legitimate interest for requiring respondents to disclose the "details" of drug treatment or counseling. *See* Pet. App. 22a. The court of appeals therefore correctly concluded that, with no competing government interest to balance against respondents' privacy interest, there was a serious question on the merits of respondents' informational privacy claim. Although the government now proffers three possible reasons for the drug-treatment inquiry to this Court, that effort comes too late.[12]

In any event, each of the government's three purported reasons fails on its own merit. First, the government suggests that it needs information on drug treatment or counseling to confirm the scope of an applicant's illegal drug use. *See* Pet. Br. 40 ("the government's reason for seeking the information is to determine whether the illegal drug use is ongoing and

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[12] Because the government's newly offered justifications for this inquiry were "neither pressed nor passed upon below," they should not be considered here. *See FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990).

whether it would affect the applicant's work performance"); *id.* at 41 (the question "seeks information directly pertinent to recent illegal drug use"). However, the government never explains how information about drug *treatment* or *counseling* could serve this purpose. Information about drug *use* falls separately within the portion of the SF-85 that requires respondents, if they answer yes to the question regarding drug use, to explain the "nature of the activity" and "any other details relating to [the applicant's] involvement with illegal drugs"—an inquiry that the Ninth Circuit found to be justified. Pet. App. 21a.

Second, the government suggests (Pet. Br. 43) that requiring disclosure of information about drug treatment or counseling is necessary to *mitigate* evidence of illegal drug use. In the lower courts, however, the government took the exact opposite position.[13] In any event, the drug treatment inquiry is much more intrusive than necessary to satisfy the government's objective. If the government wishes to give the benefit of the doubt to applicants who have sought treatment or counseling for illegal drug abuse, it could easily do so by allowing them to *voluntarily* provide such information;

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[13] The government first raised this point at oral argument in the court of appeals (*see* Oral Argument 34:20-40), and under Ninth Circuit precedent, that argument was waived. *Butler* v. *Curry*, 528 F.3d 624, 642 (9th Cir. 2008). In the district court, the government admitted that it sought medical records, not to "mitigate" evidence of drug use, but to delve into respondents' mental health history: "to the extent that you have somebody whose mental health may be unstable, you'd want to know that with respect to a person working in the facility." C.A. App. 57. Then, in the court of appeals, the government claimed that "treatment for an addiction to illegal drugs does not make the use of those drugs less illegal." Gov't C.A. Br. 30-31 n.5.

compelled disclosure of the "details" of such treatment is not necessary to serve the government's claimed interest.

The government's third purported interest—raised for the first time in this case—is that it needs to know the details of drug treatment or counseling so it can avoid engaging in disability discrimination. Pet. Br. 43. That submission is wholly unpersuasive. The government never explains how that information will help it avoid such discrimination; indeed, inquiring about drug treatment or counseling under these circumstances could only *increase* the government's potential liability for disability discrimination. Because past drug addiction is a disability, 29 C.F.R. § 1630.3(b), employers are generally prohibited from asking current employees about treatment for drug addiction or abuse unless the inquiry is "job-related and consistent with business necessity"—which means that the employer must have a "reasonable belief, based on objective evidence" that the employee is either impaired in his job performance or poses a direct threat as a result of the disability.[14] NASA has never claimed to have any such evidence or concerns in this case. Moreover, NASA could be found to have engaged in disability discrimination against an employee only if it had *knowledge* of the employee's dis-

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[14] *See* 29 C.F.R. §§ 1630.13(a)-(c), 1630.2(r); EEOC Notice No. 915.002, *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA)* (July 2000); *Sullivan* v. *River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) (for post-hire medical exam to be valid under ADA, "there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job").

ability, such as her past drug addiction.[15] If NASA does not inquire into the details of an individual's drug treatment, it will likely not learn whether that person was formerly addicted.

Because the government has thus far failed to offer a legitimate interest for requiring disclosure of the details of drug treatment or counseling, it has also failed to show that its interest outweighs the intrusion on respondents' privacy rights. The Ninth Circuit correctly concluded, therefore, that there was a serious question whether this aspect of the SF-85 could survive respondents' constitutional challenge.

C. NASA's Unbounded Inquiry Into Respondents' "Suitability" Also Potentially Implicates Sensitive Personal Matters

NASA uses the SF-85 and Form 42 for the purpose of determining respondents' "suitability" for access to JPL facilities. Taken together, those forms would allow NASA to inquire into all manner of highly sensitive personal information pertaining to respondents' private lives. Moreover, the government refused, on the record created in the lower courts, to disavow consideration of private sexual matters in making that suitability determination. The court of appeals therefore correctly concluded that NASA's unbounded inquiries potentially implicated respondents' privacy rights. And because the government has not offered any legitimate interest that would justify such an intrusion, the court of appeals also correctly concluded that a preliminary in-

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[15] *See James* v. *Potter*, 488 F.3d 397, 404 (6th Cir. 2007); *Collings* v. *Longview Fibre Co.*, 63 F.3d 828, 833 (9th Cir. 1995).

junction was warranted pending resolution of these issues on the merits.

1. Respondents' right to informational privacy is implicated because NASA has refused to disavow consideration of private sexual matters as part of its suitability determination

The government asserts that NASA's background investigation involves only the "routine collection of employment-related information" (Pet. Br. 26) and that "the only sources from which the government seeks information on these forms are the applicant himself and those references and contacts he identifies" (*id.* at 32). Such "routine and longstanding" practice, according to the government, does not "trigger significant constitutional concerns." *Id.* at 26. But the government's newly minted characterization of its background investigations of respondents does not accurately describe the record in this case. That record persuasively establishes that respondents had good reasons to be concerned that NASA's investigation would intrude into highly personal matters unrelated to their job performances—concerns that NASA did nothing to dispel.

First, when NASA announced that it would require respondents to undergo background investigations to determine their "suitability," concerned JPL employees inquired as to what criteria NASA would use to make that determination. In response, NASA posted a "suitability matrix" on its website. Pet. App. 5a n.2; J.A. 235; C.A. App. 1487; *see* J.A. 98-104. This matrix is titled "Issue Characterization Chart" and lists various factors, apparently reflecting criteria NASA will use in determining suitability. These factors include, among others, carnal knowledge, sodomy, indecent proposals,

homosexuality, cohabitation, adultery, illegitimate children, and mental, emotional, psychological, or psychiatric issues. *Id.*; Pet. App. 5a n.2. Delving into such highly personal matters represents anything but the "routine collection of employment-related information." Pet. Br. 26; *see also infra* pp. 50-51 (discussing prohibitions against intrusive background investigations for private-sector employment).

Second, the investigation is not limited to collecting information from the respondents themselves or from their references. The SF-85 requires respondents to sign a broad release authorizing the government to collect an expansive range of information from *any* source. Based on the release, the government may "*obtain any information*" from schools, landlords, employers, business, "*or other sources of information.*" J.A. 95 (emphasis added). Similarly, Form 42 asks respondents' references to provide "*any* adverse information" about respondents and to provide details regarding any issue that might bear on their "suitability" for government employment or a security clearance (even though respondents are not government employees and do not work with classified information requiring a security clearance). *Id.* at 97.

NASA's own description of the factors weighing on suitability—including respondents' sexual practices, sexual orientation, and intimate relationships—at a minimum suggests that NASA will seek to obtain information on these matters as part of the investigation into respondents' suitability. There can be little question that government collection of such information, which involves the most private and intimate aspects of respondents' lives, falls at the heart of the right to informational privacy. *Carey* v. *Population Servs., Int'l*, 431 U.S. 678, 685 (1977) (noting that sexual activity

"concerns the most intimate of human activities and relationships"); *Bloch* v. *Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) ("Our sexuality and choices about sex ... are interests of an intimate nature which define significant portions of our personhood. Public[ly] revealing information regarding these interests exposes an aspect of our lives that we regard as highly personal and private."); *Eastwood* v. *Department of Corr.*, 846 F.2d 627, 631 (10th Cir. 1988) (the right to informational privacy "is implicated when an individual is forced to disclose information regarding personal sexual matters").

The government attempts to avoid the implications of the suitability matrix by arguing that the court of appeals excluded it from the case. That argument misapprehends the court of appeals' ruling. Although the court concluded that respondents' direct challenge to the constitutionality of NASA's suitability determinations was unripe because no respondent had yet been found "unsuitable" based on the factors in the matrix (Pet. App. 9a), it never suggested that the suitability matrix was irrelevant to respondents' challenge to NASA's background investigation. The purpose of the SF-85 release and Form 42, and of the investigation overall, is to determine respondents' suitability. The matrix sets forth specific factors regarding NASA's standards for suitability. The matrix, and NASA's refusal to deny that it will use the matrix to make respondents' suitability determination, are therefore highly relevant to assessing whether the information collected during the investigation is likely to implicate respondents' privacy rights.

The government also seeks to assure this Court that NASA does not rely on the matrix when it conducts investigations into contract employees. *See* Pet. Br. 55-56. But the only evidence in the record on

this point establishes that the matrix *would be used.* Not only did NASA post the matrix on its website in response to queries from JPL employees as to how the background investigation would be used to assess their suitability, but the JPL director informed JPL employees at an informational meeting on the investigation process that they would be subjected to inquiries concerning the factors listed in the matrix. J.A. 203, 234-235.[16] The government does not argue that the record is otherwise, and all it offers is an assertion in its brief that it "does not use" the matrix (not even that it "will not" do so). *See* Pet. Br. 55. As this Court has noted, however, "supplementing the record at the appellate level" is an "extraordinary step." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 482 (1990). This Court should turn aside the government's belated attempt to "mak[e] factual representations as to matters not in the record," for "[i]t is elementary that the rights of the parties are, for purposes [of an] appeal, determined on that basis of the materials that constitute the record on appeal." *Rosen* v. *Lawson-Hemphill, Inc.*, 549 F.2d 205, 206 (1st Cir. 1976). That is especially the case here, for the government has long been on notice about re-

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[16] NASA confirmed that the matrix would be used by including the chart in its "Desk Guide for Suitability and Security Clearance," which was published in January 2008 (after the government refused to tell the court of appeals whether it would use the matrix to determine suitability) and which repeatedly refers to the matrix when describing the suitability-determination process. That guide was posted on NASA's website until a few days before the government filed its reply brief in support of its petition for certiorari. It was then taken off the website, which now states that the guide "is no longer available for viewing." *See* http://nasapeople.nasa.gov/references/SuitabilitySecurityDeskGuide.pdf (last visited July 28, 2010).

spondents' allegations and evidence regarding the matrix but passed up numerous opportunities in the lower courts to respond.

Finally, the government dismisses respondents' concern about the matrix as "baseless speculation" that NASA will delve into private sexual matters to make suitability determinations. Pet. Br. 56. But the government could easily have eliminated any "speculation" by disavowing the suitability matrix on the record before the lower courts. The government steadfastly refused to do so. Having so refused, the government cannot convincingly argue that the background investigation—which is designed to assess suitability, and which measures suitability in part by private sexual conduct—does not trigger significant constitutional concerns. On the contrary, the collection of information relating to the factors in the suitability matrix clearly implicates respondents' informational privacy rights, and the government must offer a sufficiently weighty interest that would justify that intrusion.

2. NASA has failed to provide a legitimate government interest that would justify delving into sensitive private matters

As the Ninth Circuit correctly recognized, NASA has a legitimate interest in "verifying its contractors' identities" and "ensuring the security of the JPL facility." Pet. App. 24a. On the current record, however, the government has failed to offer any explanation as to how the factors in the matrix relate to, or would further, those interests. Nor has the government offered any other rationale for delving into the highly personal matters reflected in the matrix. Instead, NASA's background investigation—which includes the SF-85 release authorizing the government to "obtain any in-

formation," the Form 42 requesting "any adverse information," and the matrix informing those inquiries—goes far beyond any legitimate employment- or security-related concerns. The government has never tried to explain, for example, why it needs to know whether respondents have illegitimate children before approving them for a badge for access to JPL—let alone has it justified inquiring into "carnal knowledge," "sodomy," or "cohabitation." This information is simply "irrelevant and embarrassing," *Eastwood*, 846 F.2d at 631, and in no way advances—or is even relevant to—the government's stated justifications for the background investigation.

Moreover, there are "no standards, guidelines, definitions, or limitations" to the government's inquires in this regard that would in any way limit the information gathered to employment- or security-related information. *Thorne* v. *City of El Segundo*, 726 F.2d 459, 470 (9th Cir. 1983). As lower courts have recognized, "[w]hen the [government's] questions directly intrude on the core of a person's constitutionally protected privacy and associational interests, ... an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which [a court] must view the [government's] action." *Id.*; *see also Denius*, 209 F.3d at 958 (the right to informational privacy can be infringed by a "sweeping disclosure requirement" that allows for "the release of a virtually limitless range of confidential ... information").

Finally, NASA's unbounded inquiries into "suitability" are particularly difficult to justify with respect to respondents, each of whom is a long-time employee at JPL and many of whom have worked there for more than twenty years. Respondents are not *applicants* for

employment whose "suitability" to work at JPL is unknown. To the contrary, respondents have had long and distinguished careers at JPL. They have worked on important spacecraft missions, made valuable contributions to the scholarly community, and been distinguished for their service. The government has never suggested that respondents pose any "suitability" or security risks to JPL. Because the government has not provided any legitimate reason for its unbounded inquiries which could pry into respondents' private sexual matters, nor any reason why such inquiries would serve the government's stated interests in verifying respondents' identities and ensuring the security of the JPL facility, the court of appeals correctly determined that serious questions had been raised regarding whether NASA's background investigation violates respondents' right to informational privacy and that those investigations should be preliminarily enjoined pending resolution of the case on the merits.

II. The Government's Remaining Arguments Lack Merit

In a series of arguments, the government maintains that, even if NASA's background investigation intrudes into sensitive personal information to a degree not sufficiently justified by the government's legitimate interests, respondents' constitutional rights are nonetheless not implicated because (1) the right to privacy implicates only public dissemination, not disclosure of information; (2) the Privacy Act sufficiently guards against dissemination; (3) the government's status as employer makes constitutional scrutiny unnecessary; (4) respondents have no privacy interest in information shared with another person; and (5) respondents relinquish

their rights by seeking to retain their positions. Each of these contentions is flawed.

A. The Right To Privacy Is Implicated By Government Collection, As Well As Dissemination, Of Sensitive Personal Information

1. Neither *Whalen* nor *Nixon* limited the informational privacy right to public dissemination of private matters

The government suggests (Pet. Br. 21-25) that the privacy concerns articulated in *Whalen* and *Nixon* are not implicated by compelled disclosure of personal information to the government, but only by further dissemination of such information to the public. Neither *Whalen* nor *Nixon* drew such bright lines, however.

To the contrary, in articulating the privacy interest in "avoiding disclosure of personal matters," the *Whalen* Court traced the source of that right to cases involving governmental intrusions into personal privacy without any subsequent public disclosure. *See Whalen*, 429 U.S. at 599 & n.25 (citing *Olmstead* v. *United States*, 277 U.S. 438 (1928) (challenge to police wiretap of defendant's private telephone conversations); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (challenge to state statute forbidding use of contraceptives); *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (challenge to state statute prohibiting private possession of obscene material)). Moreover, *Whalen* recognized that compelled disclosure to the government of sensitive personal information, even without subsequent public dissemination, could constitute an impermissible invasion of privacy. 429 U.S. at 602 ("Requiring such disclosures to representatives of the State ... does not *automatically* amount to an impermissible invasion of

privacy." (emphasis added)). While disclosure of private information to the government alone might be less intrusive on one's privacy interests than compelled disclosure to the public—and the intrusion might also be more easily outweighed by the government's interest in obtaining the information—compelled disclosure of sensitive personal information to the government nonetheless implicates constitutionally protected privacy interests.

Similarly, this Court in *Nixon* did not limit the right to informational privacy to instances of public dissemination of private matters. The Court there considered whether former President Nixon's constitutional rights were violated when his private papers were subjected to archival screening—that is, when he was forced to reveal his private papers *to the government*. *Nixon*, 433 U.S. at 456. This Court concluded that requiring such disclosure implicated Nixon's privacy rights, but that the government's access to the information was permissible because the "public interest in preserving materials touching [Nixon's] performance of his official duties" outweighed the "invasion of [Nixon's] privacy that archival screening necessarily entails." *Id.*; *see also id.* at 465 (recognizing "legitimate expectation of privacy" in Nixon's personal communications). In other words, Nixon's constitutional privacy rights were implicated by disclosure to the government—*i.e.*, government collection of information—even though the intrusion on that privacy interest was ultimately outweighed by the government's interest in reviewing the information.[17]

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[17] This Court went on to conclude that allowing government archivists to screen out and return all personal records to the

The distinction between government collection and dissemination of private information is not irrelevant to the analysis whether the government's actions are constitutional. Rather, as in other areas of constitutional analysis, competing interests must be weighed, and the degree of intrusion on the privacy right must be balanced against the state's justification for the intrusion. *See Nixon*, 433 U.S. at 456. The risk of public disclosure is a relevant factor in assessing the intrusion on privacy interests, as the court of appeals recognized. *See* Pet. App. 23a. Other factors are relevant as well, such as the expectation of privacy in the materials in question, the strength of the governmental interest in access, harms that might be caused by compelled disclosure to the government or the public, and the feasibility of realizing the government's interest in a less intrusive manner. *See, e.g.*, *Nixon*, 433 U.S. at 465; *Denius*, 209 F.3d at 956 n.7 (surveying factors that have been considered relevant by the courts of appeals). *Whalen* and *Nixon* suggest, therefore, that the distinction between collection and public dissemination is relevant to assessing the invasion of privacy caused by the government's actions, but neither case held that the right to privacy could be implicated only by public dissemination. And the lower courts have understood the right to privacy articulated in *Whalen* and *Nixon* as implicated by intrusive government collection of sensi-

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President was the least intrusive means of realizing the government's "important national interests" in preserving the official records. *Nixon*, 433 U.S. at 458-465.

tive private information, even without subsequent public dissemination.[18]

The government also relies (Pet. Br. 24) on *United States Department of Justice* v. *Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989), but that case affords it no help. *Reporters Committee* did not involve the constitutional right to privacy; it presented only the statutory question whether disclosing the contents of an FBI rap sheet to a third party falls within the Freedom of Information Act's law enforcement exception. *See id.* at 763 n.13 (recognizing that "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether ... an in-

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[18] *See Aid for Women* v. *Foulston*, 441 F.3d 1101, 1116 (10th Cir. 2006); *Planned Parenthood of S. Ariz.* v. *Lawall*, 307 F.3d 783, 789-790 (9th Cir. 2002); *ACLU of Miss.* v. *Mississippi*, 911 F.2d 1066, 1069-1070 (5th Cir. 1990); *see also Denius*, 209 F.3d at 956-957 (teacher stated claim where federal employer conditioned teacher's employment contract on employee authorizing employer's collection of his confidential medical records); *Gruenke* v. *Seip*, 225 F.3d 290, 301 (3d Cir. 2000) (plaintiff stated claim based on allegation that high school coach compelled her to take a pregnancy test); *Eastwood*, 846 F.2d at 630 (former prison employee stated claim that she was improperly forced to reveal personal facts about her sexual history to prison officials); *American Fed'n of Gov't Employees* v. *United States R.R. Retirement Bd.*, 742 F. Supp. 450, 456 (N.D. Ill. 1990) (government questionnaire asking job applicants to disclose whether they "ever had medical treatment for a mental condition" constituted "an impermissible violation of their constitutional right to privacy"); *Hawaii Psychiatric Soc'y* v. *Ariyoshi*, 481 F. Supp. 1028, 1044 (D. Haw. 1979) (compelled disclosure of psychiatric records to government was "itself an intrusion on the privacy interest in non-disclosure of personal information to government employees recognized in *Whalen*," irrespective of whether the information was to be disclosed to the public (internal quotation marks omitted)).

dividual's interest in privacy is protected by the Constitution."). Moreover, the Court's conception of privacy in that decision was clearly not limited to an interest against general public dissemination; rather, the Court referred to privacy as the "individual's control of information concerning his or her person," *id.* at 763, which is plainly implicated by the compelled relinquishment of sensitive information to the state. Indeed, the Court rejected the bright-line distinctions—and resulting "cramped notion of personal privacy"—that the government advances here. *Id.* The Court explained that even information that has previously been disclosed to the public can still be "private" because the notion of personal privacy entails "the individual's *control*" of personal information. *Id.* (emphasis added). In short, this Court's decisions lend no support to the government's argument that the right to informational privacy is implicated only when private information is publicly disseminated.

2. A bright line between collection of private information and its public dissemination would ignore significant harms to important privacy interests

Not only does drawing the line for constitutional protection of informational privacy at public dissemination lack basis in precedent, but to do so is to ignore the very real harm that governmental collection and retention of highly personal information can effect. When the government compels individuals to relinquish control of sensitive personal information, the harm to personal dignity can be profound, regardless of how widely and to whom the information is later disseminated.

"Privacy of personal matters is an interest in and of itself." *Plante*, 575 F.2d at 1134. The interest in "con-

trol[ling] the flow of information concerning the details of one's individuality" is an important aspect of privacy that can be compromised by forced disclosure to the government. *Project, Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1225 (1975). In other words, "to treat the collection of private information about [a person] as if it raised purely technical problems of safeguards against abuse," as the government proposes, "is to disregard [a person's] claim to consideration and respect as a person." Benn, *Privacy, Freedom and Respect for Persons* (1971), reprinted in *Philosophical Dimensions of Privacy: An Anthology* 231 (Schoeman ed. 1984).

This aspect of the privacy right has deep roots in the American constitutional tradition, which has regarded intrusion by *the state* into private affairs as the ultimate threat to individual liberty. As this Court has said, "the most comprehensive of rights and the rights most valued by civilized man" is the right the Founders conferred "*as against the Government*, to be let alone." *Stanley*, 394 U.S. at 564 (emphasis added); *see also* Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale L.J. 1151, 1211 (2004) ("Suspicion of the state has always stood at the foundation of American privacy thinking, and American scholarly writing and court doctrine continue to take it for granted that the state is the prime enemy of our privacy.").

This privacy tradition sees expression in numerous aspects of constitutional law. It is of course reflected in the Court's Fourth Amendment "search and seizure" jurisprudence, *see* Whitman, 113 Yale L.J. at 1212 (citing *Boyd* v. *United States*, 116 U.S. 616, 625-626 (1886) (holding government seizure of documents to be an unconstitutional invasion on the part of the government

into "the sanctity of a man's home and the privacies of his life")). It has evolved to a broader right against government intervention into the private lives of individuals. *See, e.g.*, *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) (holding that the "right to liberty under the Due Process Clause" protects the right to engage in private, consensual sexual conduct "without intervention of the government").

It is also reflected in this Court's recognition that government collection of private information can significantly harm other constitutional rights, particularly free expression and association. For example, in *Shelton* v. *Tucker*, 364 U.S. 479 (1960), this Court invalidated an Arkansas statute requiring teachers to file affidavits listing every organization to which they belonged or contributed. That statute neither required nor prohibited public dissemination of the affidavits, but the Court made clear that the compelled disclosure to the state alone would "interfere[] with personal freedom," and that "[e]ven if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." *Id.* at 486.

In sum, "[w]hen a citizen knows that his conduct and associations are being put *on file* and that the information might be used to harass or injure him, he may become more concerned about the possible content of that file and less willing to risk asserting his expressional rights." Miller, *Computers, Data Banks and In-*

dividual Privacy: An Overview, 4 Colum. Hum. Rts. L. Rev. 1, 5-6 (1972) (emphasis added). The government's notion that the right to privacy protects only against public dissemination of private information is at odds with this understanding.

B. The Privacy Act Does Not Sufficiently Protect Respondents' Sensitive Personal Information

The government argues that the Privacy Act—which as relevant here limits only dissemination, and not collection, of personal information—is sufficient to protect respondents' privacy interests in their sensitive personal information. Pet. Br. 27-29. That argument is unpersuasive.

First, the Privacy Act contains numerous exemptions under which the government may release information. 5 U.S.C. § 552a(b)(1)-(12). The broadest exemption is for "routine use[s]," *id.* § 552a(b)(3), which include any use of a record that is "compatible with the purpose for which it was collected," *id.* § 552a(a)(7). The SF-85 itself notes several "routine use[s]" for which NASA can publicly release information it collects on respondents. For example, NASA can share information with "contractors ... when necessary to perform a function or service related to th[e] record for which they have been engaged." And the government acknowledges (Pet. Br. 30 n.11) that the information on the completed SF-85 will be reviewed not only by NASA but by Caltech employees at JPL, who must review and "approve" the completed background investigation forms before forwarding them to OPM. Respondents' personal information, therefore, will be disclosed to their employer, Caltech.

Second, NASA may release information to "*any source or potential source* from which information is requested in the course of [the background] investigation ... to identify the individual, inform the source of the nature and purpose of the investigation, and to identify the type of information requested." J.A. 89 (emphasis added). In other words, NASA can release information it obtains about respondents to third-party references, employers, neighbors, or any other source that it pursues during the background investigation. These broad routine uses confirm what scholars have noted: "[t]he routine use exemption has threatened to emasculate the Privacy Act's protection of individual privacy." Coles, *Does the Privacy Act of 1975 Protect Your Right to Privacy?*, 40 Am. U.L. Rev. 957, 959 (1991).

Third, any deterrent effect against releasing private information is undermined by the limited remedies available to individuals under the Privacy Act. The Act provides individuals with no means to enjoin the government from disclosing the highly personal information it collects about them. *See Doe* v. *Chao*, 540 U.S. 614, 635 (2004) (Ginsburg, J., dissenting); *Cell Assocs., Inc.* v. *NIH*, 579 F.2d 1155, 1160 (9th Cir. 1978). The Act provides only for an *ex post* money-damages action. 5 U.S.C. § 552a(g)(4). And even in such actions, recovery is severely limited because it is available only when there are "actual damages sustained by the individual." *Id.* Some courts have held that a person can show "actual damages" only if he suffers "pecuniary losses" but not if he suffers "generalized mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries." *Fitzpatrick* v. *IRS*, 665 F.2d 327, 331 (11th Cir. 1982); *see also Hudson* v. *Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997); *Pope* v. *Bond*, 641 F. Supp. 489, 501

(D.D.C. 1986); *DiMura* v. *FBI*, 823 F. Supp. 45, 48 (D. Mass. 1993).[19] Thus, even if respondents suffered severe embarrassment from the disclosure of details about their private sexual life or sensitive drug-treatment information, they might not be able to recover anything from the government.

Finally, the government does not even address the serious and increasing problem of data breaches of sensitive information held by the government. According to the Government Accountability Office (GAO), such breaches "have occurred frequently and under widely varying circumstances." United States Gov't Accountability Office, GAO 07-737, *Personal Information: Data Breaches are Frequent, but Evidence of Resulting Identity Theft Is Limited; However, the Full Extent Is Unknown* 5 (2007). Between January 2003 and July 2006, there were 788 data breaches at 17 agencies—the worst of which affected 26.5 million records. *Id.* at 5, 20. GAO has also reported that NASA's data security is particularly vulnerable. United States Gov't Accountability Office, GAO 10-4, *NASA Needs to Remedy Vulnerabilities in Key Networks* (2009).

The government's argument that respondents' personal information will be fully protected from public disclosure by the Privacy Act is therefore unconvincing. The lack of stringent protection against public disclosure here stands in contrast to *Whalen* and *Nixon*,

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[19] Courts are split on this issue, and some courts—including the Ninth Circuit—have concluded that non-pecuniary harms such as emotional damages are compensable under the Privacy Act. *See, e.g., Cooper* v. *FAA*, 596 F.3d 538, 549 (9th Cir. 2010) (holding that the Act "encompass[es] both pecuniary *and* nonpecuniary injuries").

both of which involved rigorous safeguards. *See Whalen*, 429 U.S. at 594 (computer database containing protected information was "surrounded by a locked wire fence and protected by an alarm system" and was made available only to a small number of officials); *Nixon*, 433 U.S. at 465 (archivists handling presidential materials had an "unblemished record"). At a minimum, the court of appeals correctly concluded that the government's arguments on this point were not so convincing as to render an injunction unnecessary.

C. The Government's Interests As Employer And Proprietor Do Not Automatically Outweigh Respondents' Privacy Rights

1. The government cannot justify its background investigation based on its interests as an employer

The government places great weight on the argument that it has "far broader powers" to intrude on respondents' privacy interests here because the government is acting as an employer and not as a regulator of private conduct. Pet. Br. 18, 33. But the government's premise is incorrect.

First, respondents are not government employees. They are employees of Caltech. While the government attempts to elide that distinction (Pet. Br. 34 n.13), this Court has recognized that government contractors maintain a status "somewhere between" government employees and private individuals. *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 680 (1996). In fact, "the distinction between [government] employees and ... contractors has deep roots in our legal tradition ... [and serves as a basis for the] differential treatment of individuals who otherwise may be situated in similar positions." *O'Hare Truck Serv., Inc.* v. *City of North-*

lake, 518 U.S. 712, 721-722 (1996). It is therefore not enough to say, as the government does here, that the courts should not question the government's "personnel decision[s]." Pet. Br. 33-34.[20]

This Court has stressed the need for particularly explicit congressional authorization whenever the government would take action against a contractor that would seriously impair the contractor's "right to hold specific private employment and to follow a chosen profession." *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959).[21]

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[20] The government's reliance (Br. 53-54) on *American Federation of Government Employees* v. *HUD*, 118 F.3d 786 (D.C. Cir. 1997) ("*AFGE*") and *National Treasury Employees Union* v. *United States Department of Treasury*, 25 F.3d 237 (5th Cir. 1994) ("*NTEU*") is misplaced. In those cases, the government employees had "a diminished expectation of privacy" (*NTEU*, 25 F.3d at 244), not because they were federal employees, but because they were federal employees in *positions of public trust* (*id.* at 239; *AFGE*, 118 F.3d at 788). Both courts took "pains to underscore the obvious"—that they were "determining the rights of [government employees] in their capacity as public trust employees[.]" *NTEU*, 25 F.3d at 244; *see also AFGE*, 118 F.3d at 794. Not only are respondents not federal employees, but they are "low risk" employees of Caltech who do not hold positions of public trust. Pet. App. 3a.

[21] *Greene* also highlights another serious problem with the government's assertion of authority to investigate highly personal facts as bearing on respondents' "suitability": the lack of due process protection should the government determine on the basis of those private facts that someone is not "suitable." Persons deemed unsuitable to have a badge permitting access to JPL do not receive a statement of reasons, are not entitled to a hearing before an adjudicative officer, have no right to discovery, cannot confront or cross-examine witnesses, have no right to a public tribunal to resolve their case, and have no right of appeal outside NASA. *See supra* pp. 7-8. By contrast, *Greene* held that robust due process protections were necessary when an individual was

The government's assertion that it has the legal authority to impose background checks on these persons stretches that purported authority to, and beyond, its outer limit. The government invokes (Pet. Br. 8) the Federal Information Security Management Act of 2002, 40 U.S.C. § 11331, and certain executive agency actions promulgated under its authority, including HSPD-12, *see supra* pp. 4-5. Those provisions, however, speak only to verification of *identity* and technical requirements for a uniform badge system for access to federal facilities, not a background investigation into the suitability of contractors' employees.[22] Nor does the National Aeronautics and Space Act of 1958 ("Space Act"), 42 U.S.C. §§ 2455 *et seq.*, clearly grant NASA the authority to investigate the private lives of its low-risk contractors' employees. Although that Act allows the Administrator of NASA to conduct certain security and personnel investigations, *id.* § 2455(a), it is best read as authorizing investigations only into matters related to national security, *i.e.*, the requirements for a security clearance, and not as permitting generalized and unbounded investigations into sensitive private matters in the lives of contractors' employees.[23]

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threatened with loss of a security clearance. 360 U.S. at 496-505; *see also* Exec. Order No. 10865 (1960); Exec. Order No. 12986 (1995), implemented in Department of Def. Reg. 5200.2-R (1987, updated 2006); Department of Def. Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992, updated Apr. 20, 1999).

[22] *See* J.A. 127-130, 131-150.

[23] *Cf. Cole* v. *Young*, 351 U.S. 536 (1956) (holding that a food and drug inspector's position did not require a security clearance because statute in question authorized only full security investigations for positions that affect national security). The court of ap-

But in any event, even government employees do not give up their constitutional rights when they join the government. As this Court recently explained, "a citizen who works for the government is nonetheless a citizen.... The [Constitution] limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti* v. *Ceballos*, 547 U.S. 410, 419 (2006); *see also O'Connor* v. *Ortega*, 480 U.S. 709, 717 (1987) ("Individuals do not lose [constitutional] rights merely because they work for the government instead of a private employer."); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 605-606 (1967) ("The theory that public employment ... may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."); *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952) ("Constitutional protection does extend to the public servant[.]").

This Court has taken particular care to protect government employees from conditions on employment that do not relate to job performance or functions. *See, e.g., United States* v. *National Treasury Employees Union*, 513 U.S. 454, 457, 465 (1995) (striking down a provision of the Ethics in Government Act that prohibited low-risk executive branch employees from receiving honoraria because it extended to speeches and articles for which "neither the character of the authors, the subject matter of their expression ... nor the kind of

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peals initially agreed with respondents that the Space Act did not authorize the background investigations challenged in this case (Pet. App. 40a-42a) but reversed that ruling on rehearing (*id.* at 11a-13a).

audiences they address ha[d] any relevance to their employment"); *Shelton* v. *Tucker*, 364 U.S. at 480-481, 490 (striking down Arkansas statute requiring teachers to list all affiliated organizations as a "comprehensive interference [that] goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers"); *see also Rankin* v. *McPherson*, 483 U.S. 378, 390-391 (1987) (protecting a government employee's freedom of expression where the employee "serve[d] no confidential, policymaking, or public contact role"). Under these precedents, NASA's intrusion into non-job-related suitability factors goes "far beyond what might be justified" even if respondents were government employees. *Shelton*, 364 U.S. at 490.

Finally, petitioner suggests that NASA's background investigation must not be objectionable because private sector companies commonly conduct pre-employment checks to guard against hiring "unqualified" or "untrustworthy" employees (Pet. Br. 34-35). But respondents are not job applicants who need to be screened before hiring; they are long-time employees of Caltech—they have worked at Caltech for years if not decades—whose "qualifications" and "trustworthiness" are known quantities. The government has not offered any evidence that private employers commonly screen their employees' background even after they have been on the job for years. In any event, it is wrong to suggest that private sector companies conduct the kind of intrusive inquiry into "suitability factors" that NASA has imposed here.

Even aside from the suitability matrix, the broad inquires on Form 42 into respondents' "mental or emotional stability," "financial integrity," and "general behavior and conduct" exceed the scope of generally ac-

ceptable questioning in the private sector. For example, the authorities cited by the government (Pet. Br. 35) advise employers *not* to inquire about mental health issues. *See* Dickinson, *Hiring Smart: How to Conduct Background Checks* 63 (1997); Muller, *The Manager's Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need to Know* 154 (2009). Similarly, employer inquiries into sensitive financial information such as credit history, bankruptcies, civil judgments, and tax liens are often restricted by law.[24] With respect to "general conduct" inquiries, some states restrict employers from inquiring about, or discriminating on the basis of, employees' outside-of-work activities that do not affect work performance.[25] The government is simply wrong in suggesting that background checks in the

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[24] *See, e.g.*, 2009 Wash. Rev. Code § 19.182.020(c) (barring employers from obtaining information about an employee's credit history, unless such information is substantially related to the job or required by statute); Haw. Rev. Stat. § 378-2.7 (similar); 15 U.S.C. § 1681(c) (prohibiting reporting for employment purposes of bankruptcy information that is more than ten years old or adverse financial information that is more than seven years old for positions within certain salary limits).

[25] *See, e.g.*, Alaska Stat. § 39.26.010(a); N.Y. Lab. Law § 201-d; 830 Ill. Comp. Stat. 55/1-20; Barada & McLaughlin, *Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business, and Your Family* 46 (2004) (questions put to references should be tailored to "the candidate's ability to do the job, and nothing more"); Parker & Saperstein, 16 No. 4 HR Advisor: Legal & Practice Guideline 2 (2010) (advising that "best practice" is for employers to tailor the employee-screening process "so that it can be justified as job-related and consistent with business necessity").

private sector are similar to the sweeping inquiry that NASA claims to have the power to undertake.

2. The government also cannot justify its background investigation based on its ownership of JPL facilities

Nor is NASA's ownership of the JPL facilities sufficient to justify the background check at issue here. JPL functions as "an operating division of Caltech staffed with regular Caltech employees," and it must "conduct its business, administrative, and personnel affairs in a manner consistent with its role as an operating division of Caltech." J.A. 164, 169. In fact, "NASA encourages a high degree of interaction between the Caltech Campus and JPL at all levels." *Id.* at 165. Thus, Caltech hires JPL employees, permits JPL employees to teach at the university, and allows Caltech faculty to work at JPL and contribute to its research. *Id.* at 164, 166; *see also id.* at 187-188. Caltech's board of trustees even has a committee that supervises JPL. Unsurprisingly, therefore, NASA itself "recognizes the special character of JPL within the NASA family." *Id.* at 169; *see also* NASA, *JPL 101*, at 82 (2002), http://www.jpl.nasa.gov/about_JPL/jpl101.pdf ("As a human organization, [JPL] exists as a division of Caltech, which manages the Lab[.]").

The government argues, however, that it is "particularly important" for the government, as proprietor, to conduct background checks at "key federal research facilities like JPL" in order to protect the taxpayers' investment in this facility (Pet. Br. 35-36). But this argument rings hollow. Respondents, like all those who work at JPL, were hired by Caltech and were vetted for employment by Caltech through standard criminal background checks and employment reference checks.

E.g., Pet. App. 79a; C.A. App. 1397. And for the more than 50 years that Caltech has operated JPL, NASA has never required any additional background checks on JPL employees such as the ones that respondents challenge here. Pet. App. 5a. NASA has never suggested in this case that additional background investigations into Caltech employees at JPL were necessary because of any risk of harm to NASA's operations created by any JPL employee. Nor has NASA suggested in this case that the standard background check carried out by Caltech into applicants for employment at JPL had failed to identify any individual who posed a risk to NASA or was otherwise unsuitable. NASA's role as "proprietor" of JPL therefore does not justify the potentially intrusive investigation of long-time JPL employees like respondents.

D. Respondents Do Not Lose All Privacy Interests In Information Shared With Third Parties

The government argues that respondents have no cognizable privacy interest in "any adverse information" that the government might gather about them from third parties during the investigation because, according to the government, "[i]n the ordinary course, the fact that an individual has already revealed information to others means that it is no longer 'private' in the constitutional sense." Pet. Br. 52-53. For this proposition, the government relies on this Court's decision in *Reporters Committee* and on this Court's Fourth Amendment jurisprudence. Neither supports the government's position.

Reporters Committee points directly in the opposite direction. In that case, the Court—citing *Whalen*—described the individual's interest in privacy as encompassing "the individual's right to control" pri-

vate information, not simply as encompassing the binary choice between revealing the information to someone or keeping it "private." 489 U.S. at 763, 764 n.16. Indeed, the Court recognized that "[i]n an organized society, there are few facts that are not at one time or another divulged to another." *Id.* As such, this Court rejected the same argument that the government makes here: that there was no privacy interest in information from police rap sheets because those rap sheets had previously been disclosed to the public. *Id.*; *see also id.* at 770 ("the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information'") (citing Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, at 13 (Sept. 26-27, 1974)).

The government's Fourth Amendment argument is also unavailing. The government argues that, in the Fourth Amendment context, an individual has no expectation of privacy in information "she voluntarily reveals to a third party," and that the same principle applies here to deprive respondents of any privacy interest in personal information they might have revealed to others. Pet. Br. 53. The government's analogy is inapt, however, because the Fourth Amendment is different in kind from the right to informational privacy. The Fourth Amendment is concerned with *how* the government obtains information, while the right to informational privacy is concerned with *what* information the government obtains, regardless of how or from whom the information is obtained. The court of appeals recognized this important distinction, explaining that the right to informational privacy depends on "the *na-*

ture of the information sought ... rather than on the manner in which the information is sought." Pet. App. 22a-23a n.5.

Moreover, this Court has already rejected the premise of the government's argument. In *Nixon*, the Court recognized that the constitutional privacy interest encompassed information that President Nixon had disclosed to third parties. 433 U.S. at 465. By specifically holding that the right to informational privacy protects "personal communications" with third parties (*id.*), this Court has already rejected the government's argument here that "the fact that an individual has already revealed information to others means that it is no longer 'private' in the constitutional sense." Pet. Br. 52-53.

Indeed, under the government's reasoning, information would automatically be deemed *not* private precisely because it was shared in a setting where individuals normally have significant expectations of privacy—to a spouse, partner, or family member, or to a doctor or therapist. According to the government, the zone of privacy protected by the Constitution extends only around each individual alone and only so far as each individual keeps his thoughts to himself, but offers no shield to information shared in a relationship with another person. This Court has never adopted this impoverished concept of privacy. To the contrary, the Constitution protects *relationships* as well. *See Lawrence*, 539 U.S. at 567 (condemning statutes that "seek to control a relationship that ... is within the liberty of persons to choose"); *Griswold*, 381 U.S. at 485.

E. Respondents Are Not Voluntarily Surrendering Their Private Information

Finally, the government suggests that NASA's background investigation should not be objectionable to respondents because the disclosure of their personal information would be "voluntary." *See, e.g.*, Pet. Br. 5, 17, 53. This Court rejected this line of argument long ago, which is reminiscent of Justice Holmes' repudiated dictum that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *See O'Hare Truck Serv.*, 518 U.S. at 716-717. Respondents would not be disclosing information "voluntarily" during the NACI process. They have all been working at JPL for years, and if they do not complete the investigation process, they will lose their jobs. Pet. App. 6a. This leaves respondents with "a stark choice—either violation of their constitutional rights or loss of their jobs." *Id.* at 26a; *cf. Lefkowitz* v. *Turley*, 414 U.S. 70, 84 (1973) ("[T]he State must recognize what our cases hold: that answers elicited upon the threat of the loss of employment are compelled[.]").

A background investigation that is imposed as a condition of keeping one's job is no more "voluntary" than is a demand that a government contractor support a particular political party, *see Umbehr*, 518 U.S. 668, or a requirement that a government employee lose his job unless he takes a loyalty oath, *see Wieman*, 344 U.S. 183. Respondents "are entitled, like all other persons, to the benefit of the Constitution," and the government may not force them to choose "between surrendering their constitutional rights or their jobs." *Uniformed Sanitation Men Ass'n*, 392 U.S. at 284-285.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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In the Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., PETITIONERS

v.

ROBERT M. NELSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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401

TABLE OF CONTENTS

Page

A. There is a fundamental constitutional difference between the government's collection of information and its public dissemination 2
B. The government seeks only employment-related information in its role as a proprietor and employer 8
C. The government may ask acknowledged drug users about treatment and may ask designated references for employment-related information 16
1. SF-85 16
2. Form 42 19
D. The court of appeals' judgment cannot stand 22

TABLE OF AUTHORITIES

Cases:

ACLU of Miss. v. *Mississippi*, 911 F.2d 1066 (5th Cir. 1990) 5
Aid for Women v. *Foulston*, 441 F.3d 1101 (10th Cir. 2006) 5
Board of County Comm'rs v. *Umbehr*, 518 U.S. 668 (1996) 9
California Bankers Ass'n v. *Shultz*, 416 U.S. 21 (1974) 4
Connick v. *Myers*, 461 U.S. 138 (1983) 9
Denius v. *Dunlap*, 209 F.3d 944 (7th Cir. 2000) 5
Detroit Edison Co. v. *NLRB*, 440 U.S. 301 (1979) 6
Eastwood v. *Department of Corr.*, 846 F.2d 627 (10th Cir. 1988) 5
Eisenstadt v. *Baird*, 405 U.S. 438 (1972) 4

Cases—Continued: Page

Engquist v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146 (2008) 8, 9, 19
Griswold v. *Connecticut*, 381 U.S. 479 (1965) 4
Gruenke v. *Seip*, 225 F.3d 290 (3d Cir. 2000) 4
Mangels v. *Pena*, 789 F.2d 836 (10th Cir. 1986) 17
Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) 3, 20
O'Hare Truck Serv., Inc. v. *City of Northlake*, 518 U.S. 712 (1996) 9
Olmstead v. *United States*, 277 U.S. 438 (1928) 4
Planned Parenthood of S. Ariz. v. *Lawall*, 307 F.3d 783 (9th Cir. 2002) 4
Shelton v. *Tucker*, 364 U.S. 479 (1960) 4, 10
Skinner v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) 17
Stanley v. *Georgia*, 394 U.S. 557 (1969) 4
Tucker v. *Texas*, 326 U.S. 517 (1946) 15
United States v. *Morton*, 467 U.S. 822 (1984) 15
United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 3, 7
Washington v. *Glucksberg*, 521 U.S. 702 (1997) 20, 22
Waters v. *Churchill*, 511 U.S. 661 (1994) 8
Whalen v. *Roe*, 429 U.S. 589 (1977) 3, 4, 5, 6, 17, 22

Constitution, statutes and regulations:

U.S. Const. Amend. IV 20
Freedom of Information Act, 5 U.S.C. 552 3
5 U.S.C. 552(b)(3) 6
5 U.S.C. 552(b)(7) 7

Statutes and regulations—Continued: Page

Privacy Act of 1974, 5 U.S.C. 552a 2
5 U.S.C. 552a(a)(7) 6
5 U.S.C. 552a(e)(1) 13
5 U.S.C. 552a(e)(3) 6
5 U.S.C. 552a(e)(4)(D) 6
Space Act of 1958, 42 U.S.C. 2455(a) 11
5 C.F.R. Pt. 731 7
48 C.F.R. 52.204-9 11

Miscellaneous:

38 Fed. Reg. 33,315 (1973) 18
60 Fed. Reg. (1995):
p. 63,075 6
p. 63,084 6
71 Fed. Reg. (2006):
p. 45,859 6
pp. 45,859-45,860 6
p. 45,862 6
75 Fed. Reg. (2010):
p. 5358-5359 13
p. 5359 13
p. 28,307 6

In the Supreme Court of the United States

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REPLY BRIEF FOR THE PETITIONERS

The court of appeals broadly held that any time the government collects information an individual would prefer to keep private, it implicates a constitutional privacy right that requires the government to satisfy an *ad hoc* balancing test. The court made no distinctions based on the type of information sought, why the government sought it, and whether it would ever be disclosed publicly. Having announced its sweeping rule, the court held that the government may not conduct basic background checks before granting individuals long-term access to NASA's Jet Propulsion Laboratory (JPL), one of the Nation's premier research and development centers. That was error.

The privacy interests implicated by the government's collection of information here are minimal. The government seeks only limited, employment-related information,

and the information provided is protected from public disclosure by the Privacy Act of 1974, 5 U.S.C. 552a, and by policies adopted by the relevant agencies. Moreover, the government has a substantial need for the information as employer and proprietor, and it has used forms like those at issue here for millions of individuals over the past 50 years. In light of these circumstances, the challenged inquiries on Standard Form 85 (SF-85) and Form 42 are plainly reasonable and should be upheld.

Contrary to respondents' contention, the government is not regulating private conduct or imposing unconstitutional conditions on employment; it is using minimally intrusive, tailored inquiries to secure information relevant to its interests as an employer and proprietor. And there is no support for respondents' speculation that the government will use the background-check process to pry into their private lives. Respondents do not possess a constitutional entitlement to work at JPL without having to undergo the same background checks as their civil service counterparts. The judgment should be reversed.

A. There Is A Fundamental Constitutional Difference Between The Government's Collection Of Information And Its Public Dissemination

1. Respondents acknowledge (Br. 36-38) that there are differences between government collection of information and government disclosure of that information, both because the former is "less intrusive on one's privacy interests" and because it is "more easily outweighed by the government's interest in obtaining the information." But they nonetheless defend the analytical approach of the court of appeals (Br. 38, 40), where it does not matter "how widely and to whom the information [collected] is later disseminated."

That approach cannot be squared with *Whalen* v. *Roe*, 429 U.S. 589 (1977), and *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), which defined protection against public disclosure as the core of the informational privacy right. Gov't Br. 47-57. In both cases, the first question the Court asked was whether the information the government collected would be disclosed publicly. *Whalen*, 429 U.S. at 600-601; *Nixon*, 433 U.S. at 458. The Court then examined the statutory and regulatory provisions that protected the confidentiality of the information collected and concluded that those measures fully answered any constitutional concerns. *Whalen*, 429 U.S. at 593-595 & n.12; *Nixon*, 433 U.S. at 458, 462-463. As the Court later explained, the essence of the informational privacy right is keeping certain facts "away from the public eye." *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 769 (1989).[1]

2. Respondents cannot credibly claim (Br. 40) that the government's collection of information causes the same "harm to personal dignity" as sharing the information with the public. The government's "right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures." *Whalen*, 429 U.S. at 605. The very reason for these safeguards is to preserve the confidential character of the information, which is lost when the information is made public. See *Nixon*, 433 U.S. at 459.

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[1] *Reporters Committee* did not "reject[]" (Resp. Br. 39-40) a constitutional distinction between information collection and public dissemination; that case concerned the Freedom of Information Act, 5 U.S.C. 552. See 489 U.S. at 762-763 & n.13.

Attempting to place government collection of information on the same constitutional footing as public dissemination, respondents rely (Br. 36-37) on certain opinions cited in *Whalen*, but none concerned a freestanding informational privacy right. Instead, the opinions (several of which did not speak for the Court) observed that privacy interests are inherent in other enumerated constitutional rights.[2] The other cases respondents cite (Br. 42) either address other enumerated constitutional rights[3] or the distinct "interest in independence in making certain kinds of important decisions," *Whalen*, 429 U.S. at 599-600 & n.26.[4] None of the decisions addresses a freestanding constitutional right to informational privacy.

3. The government does not contend that the informational privacy right "protects only against public dissemination of private information." Resp. Br. 36-38, 43. As we have explained (Br. 40 n.16), there may well be circumstances in which the collection of information raises constitutional concerns, such as when collection infringes other constitutional rights, or the government fails to put in place appropriate safeguards against public disclosure.[5] But this Court and the courts of appeals

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[2] See *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 78 (1974) (Powell, J., concurring); *id.* at 79 (Douglas, J., dissenting)

[3] See *Shelton* v. *Tucker*, 364 U.S. 479, 485-487 (1960).

[4] See *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

[5] Of the cases respondents cite (Br. 38-39 & n.18) to support a claim for protection against collection of information, three involved reproductive rights. *Planned Parenthood of S. Ariz.* v. *Lawall*, 307 F.3d 783, 789-790 (9th Cir. 2002); *Gruenke* v. *Seip*, 225 F.3d 290, 301, 303 (3d Cir.

(other than the Ninth Circuit in this case) have not accepted the broad claim that the mere collection of information necessarily triggers constitutional scrutiny.

There is good reason for that caution. The government routinely receives information about individuals for legitimate public purposes. "The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require" the government to collect certain information that would be "potentially embarrassing or harmful" if publicly disclosed. *Whalen*, 429 U.S. at 605. Respondents' view, which would subject those routine activities to constitutional scrutiny under an *ad hoc* balancing test, would seriously compromise the government's ability to carry out those duties. That is why protections against public disclosure of information obtained by the government generally "evidence a proper concern with, and protection of, the individual's interest in privacy." *Ibid.*

4. Like *Whalen* and *Nixon*, this case concerns only the obtaining of information by the government, not public disclosure. Numerous statutory and regulatory provisions (including the Privacy Act) protect the confidentiality of the information collected through the

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2000); *Eastwood* v. *Department of Corr.*, 846 F.2d 627, 630-631 (10th Cir. 1988). One case simply stated that minors have constitutional privacy rights. *Aid for Women* v. *Foulston*, 441 F.3d 1101, 1116-1117 (10th Cir. 2006). One addressed public disclosure, rather than the collection of information. *ACLU of Miss.* v. *Mississippi*, 911 F.2d 1066, 1069, 1074 (5th Cir. 1990). The final decision rested on the fact that the government failed to offer any justification for its actions and failed to take steps to keep the records confidential. *Denius* v. *Dunlap*, 209 F.3d 944, 955-958 & n.6 (7th Cir. 2000).

background-check process. See Gov't Br. 26-30. The Privacy Act "give[s] forceful recognition" to a person's "interest in preserving the confidentiality of sensitive information contained in his personnel file." *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 318 n.16 (1979).

Respondents contend (Br. 44-46) that the Privacy Act does not adequately protect against public disclosure of personnel records. That was not a basis for the court of appeals' decision, and it lacks merit in any event. The Privacy Act has protected information collected through the background-check process since 1975, Gov't Br. 29, yet respondents have not identified even a single instance in which such information was disseminated publicly. A "remote possibility" of public disclosure cannot invalidate widely-used background-check forms on their face. *Whalen*, 429 U.S. at 601-602.

Contrary to respondents' contention (Br. 43-44), the Privacy Act's "routine use" exception does not permit broad release of information. It only allows disclosure for uses "compatible with the purpose for which it was collected," 5 U.S.C. 552a(a)(7), and requires the agency to "inform each individual whom it asks to supply information" of its routine uses and to explain such uses in the *Federal Register*, 5 U.S.C. 552a(b)(3), (e)(3) and (4)(D). None of the routine uses identified by NASA and the Office of Personnel Management (OPM) authorize public disclosure of private background-check information. See 71 Fed. Reg. 45,859, 45,859-45,860, 45,862 (2006) (NASA); 60 Fed. Reg. 63,075, 63,084 (1995), amended by 75 Fed. Reg. 28,307 (2010) (OPM).

There is also no reason to believe that respondents' "personal information" will be improperly disclosed to Caltech. Resp. Br. 43. A JPL employee reviews each SF-85 to verify that all of the questions were answered,

but that person "do[es] not disclose any information contained on the form to anyone else," and Caltech keeps no record of the information collected. J.A. 211-212. NASA (not Caltech) decides whether to grant or deny access, and any adverse information learned during a background investigation "shall not be disclosed to the individual's employer." J.A. 207-208, 211-212; C.A. E.R. 519.[6]

Respondents assert (Br. 44) that the government may broadly disclose background-check information to "references, employers, neighbors, or any other source." But disclosure to sources is allowed only "to identify the individual [being investigated], inform the source of the nature and purpose of the investigation, and to identify the type of information requested." J.A. 89; see J.A. 96 (Form 42 disclosure). And these sources are individuals that the applicant himself listed on SF-85. Respondents also suggest (Br. 5, 43) that private information about them could be disclosed to the media, but any disclosures of the information received are sharply restricted by law. Such disclosures are only allowed in the rare case that they would be "in the public interest" and would not constitute an "unwarranted invasion of personal privacy." J.A. 89; see 5 U.S.C. 552(b)(7); see generally *Reporters' Comm.*, 489 U.S. at 762-765.

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[6] Respondents are wrong to assert (Br. 6) that NASA will decide whether they are suitable for employment under 5 C.F.R. Pt. 731; that regulation governs civil service employment, not credentialing. See Gov't Br. 36 n.15; pp. 15, *infra*.

Respondents also suggest (Br. 7, 47 n.21) that procedures for appealing denials of credentials are inadequate. They did not litigate that claim below, and it is not relevant to their facial challenge to the background-check forms.

Finally, respondents contend (Br. 45) that their personal information may be vulnerable to data breaches or unauthorized access. None of the reports they cite focus on background-check data; instead, they address malicious attacks on computer networks or they identify risks that cannot be absolutely eliminated when any information is stored electronically. Such remote possibilities do not undermine the force of the Privacy Act's protections as a constitutional matter.

Respondents also ignore the fact that in applying the background-check process to federal contract employees, both the Commerce Department and the Office of Management and Budget (OMB) adopted specific procedures and requirements for maintaining the confidentiality of information obtained. See Gov't Br. 29-30. Those concrete measures reinforce the Privacy Act's protections and further reduce any risk of public disclosure.

B. The Government Seeks Only Employment-Related Information In Its Role As A Proprietor And Employer

1. The only reason the government makes the inquiries at issue is because respondents seek long-term access to federal facilities and information systems as contract employees. The government is not conducting free-ranging inquiries into citizens' private lives as a regulator. Gov't Br. 33-34. As this Court has explained, the government has "far broader powers" when acting as an employer and proprietor than as a regulator. *Engquist* v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008) (quoting *Waters* v. *Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)).

Respondents point out (Br. 46) that they are not civil servants but contract employees. This Court has never

restricted the deference due to the government in the employment context to actions affecting civil servants. Instead, it has afforded deference when the government acts "as proprietor, to manage [its] internal operation," *Engquist*, 128 S. Ct. at 2151 (internal quotation marks omitted; alteration in original), and it has specifically held that deference is "due to the government's reasonable assessments of its interests *as contractor*." *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668, 678 (1996); see *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712, 714 (1996) ("[T]he government has broad discretion in formulating its contracting policies.").

The reasons for that deference are plainly applicable here: NASA must be able to ensure the hiring of individuals who will fulfill the mission of JPL safely and effectively, see *Engquist*, 128 S. Ct. at 2151; NASA, not the federal judiciary, is best positioned to decide how to fulfill JPL's mission, *id.* at 2151-2152; and NASA "could not function" if every personnel decision "became a constitutional matter," *Connick* v. *Myers*, 461 U.S. 138, 143 (1983). Although constitutional analysis must "accommodate the differences between employees and independent contractors" when those differences are material, *Umbehr*, 518 U.S. 768, here they are not. At JPL, contract employees perform duties functionally equivalent to—and have the same access to facilities and systems as—their civil service counterparts. J.A. 221-222.

This is not a case in which the government has imposed an unconstitutional condition on federal employment. In the decisions respondents cite (Br. 47-50), the conditions imposed lacked the requisite nexus to job duties. Here, by contrast, the very purpose of the background check inquiries is to determine whether individuals are sufficiently reliable and trustworthy to gain

long-term access to federal facilities and information systems. See *Shelton* v. *Tucker*, 364 U.S. 479, 485 (1960) ("There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires.").

2. The government's need to conduct background checks of contract employees is compelling. After the terrorist attacks of September 11, 2001, revealed security vulnerabilities in federal facilities, the President directed the Commerce Department to develop a mandatory and uniform standard for access to federal facilities and information systems. See Gov't Br. 7-8; J.A. 127-130 (*HSPD-12*). The Commerce Department determined that individuals seeking long-term access to federal facilities and systems should undergo background checks, in order to confirm their identities and ensure that they are reliable and trustworthy. J.A. 131-150 (*FIPS 201-1*); see J.A. 217-218, 222-223, 225. That requirement makes sense in the modern federal workforce, where contract employees perform many of the same functions as civil service employees. J.A. 221-222.

Respondents' assertion (Br. 48) that *HSPD-12* does not authorize background checks ignores (1) the President's decision to have the Commerce Department determine how to best fulfill its goals; (2) the Commerce Department's judgment that background checks are necessary to ensure facility and system security; and (3) the Executive's continued implementation of that judgment, despite the considerable commitment of resources involved. Gov't Br. 8. Respondents also ignore NASA's separate decision to conduct background checks of contract employees after determining that the failure to conduct such checks posed a security vulnerability. *Id.* at 10-11. And respondents' contention (Br. 47-48) that

NASA lacks the authority to conduct background checks was properly rejected by the courts below. Pet. App. 11a-13a (the Space Act of 1958, 42 U.S.C. 2455(a), "grant[s] NASA the statutory authority to require the investigations here"); *id.* at 65a-66a (same).[7]

As the government has established (Br. 34-35), public and private employers routinely conduct background checks. Respondents contend (Br. 52-53) that such checks are unnecessary because Caltech investigated them. But respondents' own declarations refute that assertion. *E.g.*, C.A. E.R. 1397 ("I have never been required to undergo any type of background investigation to maintain my position with JPL other than * * * [one] which required that I provide my name, social security number[,] and current address."); *id.* at 1289, 1346-1347, 1361, 1367 (similar). Respondents are likewise wrong to contend (Br. 50) that the government cannot conduct background checks of individuals already working at government facilities. Especially where, as here, the individuals have never completed the government's standard background check, it is surely reasonable for the government to conduct that basic investigation.[8]

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[7] Contrary to the contention of respondents' amicus (UCS Br. 6-8, 12-13), the fact that the government has delegated day-to-day management of Federally Funded Research and Development Centers does not preclude the government from placing conditions on long-term access to those facilities. See 48 C.F.R. 52.204-9; J.A. 225.

[8] Respondents incorrectly assert (Br. 4) that NASA has required that Caltech discharge any JPL employees who do not complete a background check; the decision whether to continue employing such individuals in positions that do not require long-term access to federal facilities and systems is Caltech's. Pet. App. 28a.

The government's interest in controlling access to its facilities and information systems is particularly strong at JPL. JPL is "one of the premier research institutes in the world," with an annual budget of over $1.5 billion. Resp. Br. 1; Gov't Br. 10, 35-36. All positions at JPL are filled by contract employees, and they perform the same functions and enjoy the same access to facilities and information systems as their civil service counterparts at other NASA centers. J.A. 221-222. Respondents themselves work on a variety of mission-critical projects. See Gov't Br. 36-37.

Although respondents have been classified as low-risk under NASA's particular internal system, even low-risk employees "have access to the entire facility" and can "get very close to facilities where sensitive or classified work is conducted." J.A. 207. Such individuals also have broad access to "Government and supplier data, including sensitive and proprietary data." J.A. 164. Indeed, any individual granted long-term access to JPL has the "potential" to "cause serious damage to [its] publicly funded missions." J.A. 207.

NASA may protect its investment by requiring routine background checks for all individuals seeking long-term access to JPL. It is likewise reasonable for the Commerce Department to implement *HSPD-12* by uniformly requiring background checks for all contract employees who will access federal facilities and information systems.

3. The background-check forms respondents challenge seek only employment-related information. That is clear from the forms themselves: SF-85 informs the applicant that it is used to "conduct[] [a] background investigation[]" to determine whether he is "reliable, trustworthy, and of good conduct and character," J.A.

88-89; and Form 42 informs references that they are asked to "assist in completing a background investigation" of an applicant by verifying data he has provided and answering questions about activity that "ha[s] a bearing on [his] suitability for government employment or a security clearance," J.A. 96-97. Those forms are used only for personnel background investigations and not for any other purpose. 75 Fed. Reg. at 5358-5359.

Respondents contend (Br. 28-31) that the government will use these forms to obtain information about their private lives. But respondents challenge the forms on their face, and the forms on their face only request information relevant to fitness for employment. Gov't Br. 31-33. The only individuals from whom these forms seek information are the applicant and individuals he designates on SF-85 as references or individuals who can verify residences and periods of self-employment or unemployment. J.A. 96, 210, 218; 75 Fed. Reg. at 5359.[9] Moreover, the Privacy Act furnishes independent protection for the information collected: it permits a federal agency to collect and maintain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by [E]xecutive [O]rder." 5 U.S.C. 552a(e)(1); see Gov't Br. 7 n.4, 32-33.

4. Unable to find fault with the forms on their face, respondents speculate (Br. 28-33) that the government might use the forms to "intrude into highly personal matters unrelated to their job performance." In support

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[9] Respondents suggest (Br. 30, 33-34) that the government will rely on the release contained on SF-85 to engage in a fishing expedition for personal information. But Form 42 is sent only to individuals designated on SF-85 as described above, and the court of appeals did not address any claim about other uses of the release.

of that assertion, they rely on an "issue characterization chart." This claim is not properly before the Court. As previously explained (Gov't Br. 54-55; Cert. Reply 9-10), respondents made two arguments below: that the forms on their face sought impermissible information, and that the government would use the information from the forms to make credentialing decisions on improper grounds. Both the district court and the court of appeals found the latter claim "unripe and unfit for judicial review" and concluded that the record "does not sufficiently establish" how the government will make credentialing decisions. Pet. App. 8a-9a; see *id.* at 61a-63a. Respondents nevertheless attempt to revive that claim (Br. 31) by contending that the chart affects what information the government will receive on the forms in the first place. But the court of appeals found the chart irrelevant to the claim at issue here, instead judging the constitutionality of SF-85 and Form 42 on their face. Pet. App. 4a-5a, 19a-26a.

In any event, there is no evidence in the record showing that NASA would use the chart for credentialing decisions. The evidence respondents cite (Br. 29-30, 32) is their own affidavits, which state that a JPL employee (not a federal employee) posted the chart on JPL's intranet site, and that the director of JPL (not a federal employee) suggested that credentialing decisions would be made using this chart. J.A. 203, 234-235; C.A. E.R. 1471, 1487. Those statements do not establish that "*NASA* posted a 'suitability matrix' on its website" or

that "*NASA* will use [this matrix] in determining suit ability." Resp. Br. 7, 29 (emphasis added).[10]

Moreover, the government has repeatedly disavowed use of respondents' chart. See Gov't Br. 55; Cert. Reply 10. OPM has issued standards that all agencies must use in credentialing federal contract employees, and those standards do not consider private sexual activity or any other improper factor. Cert. Reply 10-11. OPM recently issued additional guidance to all agencies, reminding them that these standards—which do not include respondents' chart—are the exclusive standards for making credentialing decisions. See Gov't Br. 55 (citing guidance).[11]

Respondents ignore OPM's exclusive credentialing standards. They also ignore the numerous federal prohibitions on employment discrimination that protect federal contract employees. Gov't Br. 55. And although NASA has completed background checks for over 39,000 contract employees, respondents have not identified any instance in which the government has sought improper information or denied access to federal facilities or systems based on improper grounds. See *id.* at 56 (citing J.A. 213, 224). Respondents' baseless speculation

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[10] Respondents cite the *Suitability Desk Guide* (Br. 32 n.16), but that document (which is not in the record) is used for hiring civil service employees, not credentialing contract employees.

[11] Taking note of OPM's guidance is not improperly supplementing the appellate record (Resp. Br. 32); this Court may take judicial notice of such agency actions, see, *e.g.*, *Tucker* v. *Texas*, 326 U.S. 517, 519 n.1 (1946), and the fact that OPM's notice was issued after the commencement of this litigation and addresses administrative concerns arising from it does not detract from its legal force, see *United States* v. *Morton*, 467 U.S. 822, 835 n.21 (1984).

cannot facially invalidate the longstanding and widely-used forms at issue here.

C. The Government May Ask Acknowledged Drug Users About Treatment And May Ask Designated References For Employment-Related Information

The court of appeals erred in invalidating the drug-treatment question on SF-85 and the questions on Form 42.

1. SF-85

Respondents conceded below that "most of the questions" on SF-85 "are unproblematic and do not implicate the constitutional right to informational privacy." Pet. App. 19a. They do not contest the court of appeals' holding that the government has a strong interest "in uncovering and addressing illegal substance abuse among its employees and contractors" and that the questions on SF-85 asking whether and how often an applicant has used illegal drugs in the past year are "narrowly tailored" to further that interest. *Id.* at 19a-21a. But they contend (Br. 21) that the government cannot make the natural follow-up request to include "any treatment or counseling received." Respondents are wrong for two reasons. First, the follow-up question does not broadly seek "medical information," Resp. Br. 22; it seeks limited information about whether an individual has ceased engaging in illegal activity that would affect job performance. Second, any privacy interests implicated by the question are easily outweighed by the government's need for the information.

a. Respondents minimize altogether the fact that the challenged request is not a freestanding inquiry about treatment and counseling, but a follow-on question relevant only to an applicant who already has ac-

knowledged using illegal drugs in the past year and identified the types of drugs and nature of his use. J.A. 94; see Pet. App. 22a. This narrow question does not implicate significant informational privacy concerns. As the court of appeals noted, the drug laws "put citizens on notice" that illegal drug use is not a "private" area. Pet. App. 19a-20a (quoting *Mangels* v. *Pena*, 789 F.2d 836, 839 (10th Cir. 1986)). The follow-up question asks only whether there has been treatment or counseling; it does not ask about medical treatment generally, seek medical records, or require that the applicant disclose confidential conversations with a therapist. Resp. Br. 21. Indeed, the request does not specify any particular level of detail in the response.

Respondents' contention (Br. 21) that individuals would be stigmatized for acknowledging drug treatment ignores the fact that they have already reported both the fact and nature of their recent illegal drug use. See J.A. 94. At that point, the additional fact of treatment generally lessens concerns about drug abuse. These circumstances distinguish the inquiry here from general medical inquiries, where the individual's privacy interest stems from his desire to keep his underlying condition private. See *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). As in *Whalen*, which also concerned information about drugs, the information is provided only to certain government officials for limited purposes and there is no appreciable risk "that the information will become publicly known." 429 U.S. at 600; see Gov't Br. 41-42.

b. Any privacy interests implicated by the drug-treatment question are greatly outweighed by the government's need for the information. The court of appeals itself recognized why the government requests it:

the fact that an acknowledged drug user has sought treatment "*lessen[s]* the government's concerns" that the drug use will affect job performance. Pet. App. 22a. Indeed, the government has explained that it seeks such information in order to identify situations "in which, despite counseling and rehabilitation programs, there is little chance for effective rehabilitation." 38 Fed. Reg. 33,315 (1973).

Respondents do not take issue with this common-sense explanation of the question's purpose, but instead claim that the government waived the argument below. That is wrong: the government argued to the court of appeals that the government has a strong interest in determining whether an individual will be a safe and reliable employee despite recent drug use. Gov't C.A. Br. 29-30, 38-41. Respondents never distinguished below between the government's need for information about drug treatment as opposed to drug use, Resp. C.A. Br. 40-47; Resp. C.A. Reply Br. 17-21, but when the court did so at oral argument, the government gave the explanation advanced here, 07-56424 Oral Arg. 33:49-34:40 (9th Cir. Dec. 5, 2007). The court of appeals then noted this significance of drug treatment in its opinion. Pet. App. 22a.[12]

The drug-treatment question is appropriately tailored to further the government's interests. It allows an applicant who has specified that he recently has used drugs to ameliorate concerns about his ability to do the job, and it does not specify any required level of detail. Respondents suggest (Br. 26) that the government

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[12] Respondent's citation (Br. 26 n.13) to the district court record (C.A. E.R. 56-57) is inapposite; that exchange addresses when separate releases might be required for medical records, not the drug-treatment question on SF-85.

should make the question optional. But that would materially reduce the question's effectiveness in determining which acknowledged drug users are able to do the job, and such second-guessing runs contrary to this Court's admonition that the government has broad authority as employer and proprietor to match the best workers to each task it needs to perform. *Engquist*, 128 S. Ct. at 2152. With limited exceptions, all Executive branch employees requiring long-term access to federally-controlled facilities and information systems must have completed an investigation that includes questions about drug use and treatment. The federal government is properly within its duties as an employer and proprietor to ask the same questions of its contract employees.

Significantly, respondents do not engage in any balancing of interests, instead simply contending (Br. 28) that no "legitimate interest" supports the drug-treatment question. Because the fact of treatment is plainly relevant to the applicant's ability to do the job, and because the privacy interests implicated by disclosure of this limited information (which is never made public) are minimal, any necessary balancing of interests tips sharply in favor of the government.

2. Form 42

The court of appeals erred in invalidating use of Form 42, both because the form seeks a third-party's impressions of a person rather than private facts, and because the form is a necessary and effective way to further JPL's mission and protect its investments.

a. Respondents all but ignore the specific questions contained on Form 42, instead focusing on the chart that is not at issue here. See pp. 14-16, *supra*. When the inquiry is properly focused on the face of Form 42, it is

clear that the government seeks only information that is employment-related and of a type that is not normally considered private. The form asks the reference how long and in what capacity he has known the applicant, and then asks for the reference's opinion, based on his interactions with the applicant, whether he "ha[s] any reason to question this person's honesty or trustworthiness" or knows of any behavior that "may have a bearing on this person's suitability for government employment or a security clearance." J.A. 97.

When a person voluntarily triggers a background investigation and names references for the government to contact, that person does not have a constitutional right to control what those references say about him. Respondents cite no decision recognizing a constitutional privacy right that extends so far, and such a rule would be far afield of the interest in "personal autonomy" the right is intended to protect. *Washington* v. *Glucksberg*, 521 U.S. 702, 727 (1997). Moreover, to the extent that the applicant already has disclosed information to the reference in a school, work, or neighborhood setting, it can hardly be considered private. This Court has determined in the Fourth Amendment context that a person who discloses information to another assumes the risk that it will not remain private, see Gov't Br. 52-53 (citing cases); Pet. App. 13a-17a, and it has relied upon that theory in determining the scope of the informational privacy right, see *Nixon*, 433 U.S. at 455-461. That is not to say that obtaining information from third parties could never implicate constitutional privacy interests, but only that such instances are rare and likely would involve requests for information that infringe on interests or relationships that are independently of constitutional dimension. Gov't Br. 52. Here, the purpose

of Form 42 is to seek information about whether a person would be a good employee, based on the reference's interactions with the person. Such queries are far removed from the core of the informational privacy right.

b. Even assuming that Form 42 requests information in which respondents have a constitutionally protected privacy interest, the government's strong interests justify its use. The court of appeals determined (and respondents do not contest) that Form 42 is supported by the government's need to "verify[] * * * contractors' identities" and "ensur[e] the security of the JPL facility so as not to jeopardize the costly investments housed therein." Pet. App. 24a. The court of appeals invalidated the use of Form 42, however, because it believed the form sought non-employment-related information and thus was insufficiently tailored to meet those needs. *Id.* at 25a.

The court of appeals was mistaken. By its terms, Form 42 seeks only information that "ha[s] a bearing on [the applicant's] suitability for government employment or a security clearance." J.A. 96-97. The fact that these questions, coming as they are in the employment setting, are somewhat open-ended is not a constitutional infirmity. "Without open-ended questions, it is hard to know what potential problems might need an explanation," and an employer would "get[] stuck with people who should not have been hired, and even, occasionally, people who are dangerous." Pet. App. 124a (Kleinfeld, J., dissenting from denial of rehearing). Such questions are commonly used by private employers. Gov't Br. 46; CDIA *Amicus* Br. 4-8. Form 42 has been used for decades and more than 1.8 million such forms are sent out each year. Gov't Br. 6. That pervasive practice fatally undermines respondents' position that their use in the

background-check process here results in an unconstitutional infringement of personal privacy interests. See, *e.g.*, *Whalen*, 429 U.S. at 602, 605.

D. The Court Of Appeals' Judgment Cannot Stand

In ordering injunctive relief, the court of appeals entirely ignored this Court's seminal decisions in *Whalen* and *Nixon*. Rather than follow the approach set out in those cases, it extended the informational privacy right far beyond anything ever suggested by this Court, holding that constitutional scrutiny is required any time the government seeks any information an individual generally would not disclose to the public, regardless of the nature of the information, why the government seeks it, and whether there are protections against public disclosure. Pet. App. 18a-21a. The court did not tether that broad privacy right to any particular provision of the Constitution or ask whether the interests involved are "fundamental" and "deeply rooted in this Nation's history and tradition." *Glucksberg*, 521 U.S. at 720-722 (internal quotation marks and citations omitted).

Respondents' position, at bottom, is the same. They ask this Court to recognize a broad informational privacy right to invalidate a longstanding system of background checks, without even citing any provision of the Constitution in their brief. They subscribe to the court of appeals' broad conception of what information is considered private, and they too would require *ad hoc* balancing without regard to context or statutory privacy protections. Resp. Br. 15-19. Respondents suggest few limits to their position, and their broad-based attack makes it difficult to see which inquiries their approach would allow government employers to make before

granting an individual long-term access to important federal facilities and information systems.

This case does not require the Court to define the contours of the informational privacy right, because respondents' claims are so far afield of the core of what the right protects. Here, respondents' facial challenge can easily be rejected in light of the limited nature of the information sought, the Privacy Act's protections regarding the maintenance and dissemination of the information, the familiar employment-related context of the inquiry, the government's broad authority in acting as an employer and proprietor, and the longstanding and widely-accepted use of SF-85 and Form 42.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

SEPTEMBER 2010

AMICUS CURIAE BRIEF

No. 09-530

IN THE
Supreme Court of the United States

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION, ET AL.,
Petitioners,

V.

ROBERT M. NELSON, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASTRONOMICAL SOCIETY IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Imposition of Unnecessarily Intrusive Background Checks Could Impair the Ability of Astronomers to Conduct Research and Complete Projects 3

A. The Astronomy Community Is Small and Interdependent 4

B. Certain Rationales Advanced By Petitioners Could Have An Even More Severe and Widespread Impact on the Astronomy Community 7

II. Unnecessarily Intrusive Background Checks Will Adversely Affect U.S. Leadership in Astronomy 10

III. Results Produced by NASA Missions Are Critical for the Field 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

ARTICLES & REPORTS:

Metcalf, Travis S., *The Production Rate and Employment of Ph.D. Astronomers*, Vol. 120, Issue 864 Publications of the Astronomical Society of the Pacific 229 (Dec. 19, 2007), *available at* http://arxiv.org/PS_cache/arxiv/pdf/0712/0712.2820v2.pdf 4

Montell, Gabriela, *Web Sites Track Rumors About Astronomy Job Market*, The Chronicle of Higher Education (Apr. 30, 1999), *available at* http://chronicle.com/article/Web-Sites-Track-Rumors-About/45607/ 5

National Academy of Sciences, *Federal Funding of Astronomical Research* (2000), available at http://books.nap.edu/openbook.php?record_id=9954&page=56 1

Thaler, Sebastian, *Scarce Jobs in Astronomy: A Cosmic Shame?*, FoxNews.com (Oct. 16, 2007), *available at* http://www.foxnews.com/story/0,2933,301956,00.html 5

INTEREST OF THE AMICUS CURIAE

The American Astronomical Society ("AAS") is a membership organization for professional research astronomers. With more than 7,500 members, the AAS is the largest such organization in the world. It is also one of the oldest – the AAS was founded in 1899.[1]

The AAS' mission is to enhance scientific understanding of the universe. The AAS publishes the major peer-reviewed research journals in the field, organizes scientific conferences on an annual basis, maintains specialized divisions focused on particular sub-disciplines, and maintains a comprehensive set of activities to support our members in their professional careers and to bring scientific knowledge of the universe to the public. The AAS has never before filed an amicus brief in this Court, but is impelled to do so in this case.

This case has significant implications for the AAS and its members. Federal grants are vital to astronomy, and the National Aeronautics and Space Administration ("NASA") provides the dominant source of federal funding.[2] Yet, a significant number

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[1] Both parties have consented to the filing of this *amicus* brief in letters lodged with the Clerk of Court. *Amicus* further state that no counsel for either party authored this brief in whole or in part. Additionally, no party or counsel for a party – or any person other than *amicus* – made a monetary contribution intending to fund the preparation or submission of this brief.

[2] In 1999, for example, NASA provided 72% of research funding for astronomers. *See* National Academy of Sciences, *Federal Funding of Astronomical Research* 56 (2000), *available*

(Continued ...)

of U.S. astronomers would be or are unwilling to work in an environment where they are subject to the intrusive, open-ended background investigations at issue here. Their loss will adversely impact the entire professional community – even those individuals that agree to undergo the background investigations.

Astronomy has a small and interdependent community. If individual astronomers do not carry out particular research, other astronomers will not have the data necessary to perform their own research, as often there is no other source for needed data. The field of astronomical research and individual research astronomers will suffer as a result.

In addition, the AAS is concerned that the precedent set by this case could be extended to support requiring similarly intrusive background checks at all federally supported institutes and observatories, or even of scientists receiving federal grants for research in astronomy generally. This brief traces the real-world implications that such a ruling could have on the science of astronomy and its practitioners.

SUMMARY OF ARGUMENT

The AAS believes that a decision supporting the imposition of unnecessarily intrusive background checks would needlessly limit the careers of professional astronomers, diminish the likelihood

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at http://books.nap.edu/openbook.php?record_id=9954&page=56 (last visited Aug. 7, 2010).

that uniquely talented individuals would work on specific projects to the detriment of our nation, and pose unnecessary risks to the success of NASA missions.

In addition, the AAS believes that a decision supporting the imposition of intrusive background checks in this case could set a legal precedent for imposing such invasive background checks much more broadly. It could even be extended to recipients of federal research grants generally. This would expand the impact from the specific situation of the Jet Propulsion Laboratory ("JPL") to most scientists seeking to understand our universe through astronomical research. The AAS views this as risking significant harm to the expansion of human knowledge. The national interest in astronomy is best protected by a balanced approach which accommodates the government's interest in facility security while avoiding needlessly invasive intrusions on the privacy reasonably expected by astronomical researchers.

ARGUMENT

I. The Imposition of Unnecessarily Intrusive Background Checks Could Impair the Ability of Astronomers to Conduct Research and Complete Projects

Astronomy is a small field, with relatively few places where it can be pursued. Some forms of this science are limited to analysis through space missions. Background check policies that cause scientists to leave an organization would significantly limit their capability for research, as no

equivalent location may exist for them to carry out their specific area of research.

A. The Astronomy Community Is Small and Interdependent

There are relatively few professional astronomers and only a limited number of locations at which they can conduct their original research. For students in the field, the statistical odds of a long-term career in astronomy are comparable to the chances of becoming a professional athlete.[3] In this country, the typical professional has a Ph.D. in astronomy. This can take a long time – six years beyond a Bachelor of Science degree is common. The AAS has a membership of just over 7,500 members as of July 1, 2010, a fraction of most other professions.[4]

Astronomy is a small field compared to other disciplines. Physics, the closest field topically to astronomy, is more than six times larger.[5] The field

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[3] *See* Travis S. Metcalf, *The Production Rate and Employment of Ph.D. Astronomers*, Vol. 120, Issue 864 Publications of the Astronomical Society of the Pacific 229, 229 (Dec. 19, 2007), *available at* http://arxiv.org/PS_cache/arxiv/pdf/0712/0712.2820v2.pdf.

[4] As the AAS website states, that membership number "includes physicists, mathematicians, geologists, engineers and others whose research interests lie within the broad spectrum of subjects now comprising contemporary astronomy." American Astronomical Society website, http://aas.org/.

[5] *Compare* American Astronomical Society, http://aas.org/membership/memcount.php (membership count over 7,000), *with* American Physical Society,

(Continued ...)

of chemistry, another closely aligned physical science, is more than twenty times larger.[6] Moreover, there are fewer research opportunities and employment possibilities in astronomy.[7] An individual may only be able to pursue research at one, or at most a few, institutions.[8] And competition for research opportunities is fierce. For example, only a small minority of applications to use the Hubble Space Telescope are accepted.[9]

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http://www.aps.org/membership/statistics/index.cfm (membership count at 47,947).

[6] *See* American Chemistry Society, www.acs.org (follow "About Us" hyperlink; then follow "Learn More About ACS" hyperlink) (membership count at 161,783).

[7] "It's a fact: The field of study with the largest subject matter of all — the universe itself — has a very small window of opportunity for those who want to do it full-time." Sebastian Thaler, *Scarce Jobs in Astronomy: A Cosmic Shame?*, FoxNews.com (Oct. 16, 2007), *available at* http://www.foxnews.com/story/0,2933,301956,00.html.

[8] The astronomy job market is notorious for being difficult. Several websites have been created just to track "rumors" about possible astronomy jobs. *See* Gabriela Montell, *Web Sites Track Rumors About Astronomy Job Market*, The Chronicle of Higher Education (Apr. 30, 1999), *available at* http://chronicle.com/article/Web-Sites-Track-Rumors-About/45607/.

[9] *See* the Hubble website ("More scientists want to use the telescope than there is time to use it, so a review committee of astronomy experts has to pick out the best proposals from the bunch. * * * Each year around 1,000 proposals are reviewed and approximately 200 are selected ...."), *available at* http://hubblesite.org/the_telescope/hubble_essentials/.

Astronomers are often specialized in particular lines of research. In astronomy, it is not unusual to find no more than 5 to 10 people working on a particular research topic. It is not surprising to find even fewer individuals, sometimes just a single person, pursuing a particular line of research. There is often a very limited pool of applicants for leadership positions for projects and missions – as few as three to nine is common.

Few institutions have the facilities to support this research, particularly for projects in space. The necessary facilities to carry out research in astronomy are unique. Additionally, certain kinds of research can only be performed from space. This includes observations of portions of the electromagnetic spectrum that are blocked wholly or in part by the Earth's atmosphere or *in situ* observations or sampling of solar system objects, as with planetary probes like the Mars Rovers.

Due to the limited number of professionals and supporting institutions, the imposition of unnecessarily intrusive background investigations could have several adverse implications. For those researchers that refuse to undergo the investigation, their careers will likely be impaired as there would be no viable alternative employer for their line of research or expertise. They must work at a location that enables their research, which may be unique, and likely would be unable to find alternative employment at a facility that did not demand an intrusive background check.

For those that agree to undergo the background investigation, their careers also will be adversely

impacted by the effect on colleagues on whose work they must rely. To carry out their research effectively, they often need the research knowledge or expertise of others, whose loss would undermine or jeopardize the successful completion of their projects. These collegial interactions would be hindered significantly in the case of unique research carried out at particular facility. If the researcher is not working at the right place, with the right people, then successful completion of their research may not be possible. This is demonstrated in the field of astronomy through the growth of specialized research groups or teams, which actively recruit specialized researchers to accomplish a particular line of research. This practice is common and widespread. Astronomy succeeds partially through such focused team-based research. The AAS believes that the loss of even a small percentage of astronomers as a result of overly intrusive background checks could threaten a slow-down or even stagnation in astronomical research in this country.

In short, unnecessarily intrusive background check policies can be disruptive to the careers of AAS members and to the broader population of astronomical researchers in the United States.

B. Certain Rationales Advanced By Petitioners Could Have An Even More Severe and Widespread Impact on the Astronomy Community

Astronomers recognize that the federal government has a legitimate interest in protecting sensitive information and military equipment, and

that choosing to work on classified projects or in a secure environment as a government employee will involve extensive background checks, just as these are required for FBI or CIA employees. Astronomers do not expect to need such clearance if they are working on non-classified material, are not employed by the government, and seek only to have access to a government facility to attend seminars, meet with collaborators, or work on non-classified projects.

Astronomers who object to intrusive background checks do so not because they have something to hide, but because the intrusive background checks are contrary to long-standing, legitimate expectations of privacy. All JPL astronomers already have been the subject of appropriate screening, evaluation and background checks, and under the Ninth Circuit's decision will now be required to disclose personal information such as that regarding their own drug use. (App. 81a). However, unnecessarily expanding background inquiries to the level of intrusiveness requisite for an applicant for government employment requiring a security clearance impinges on the expectations of privacy the scientists had when embarking on careers in research. Astronomy is the study of objects that are hundreds of millions of miles to hundreds of millions of light-years away. The study of these objects does not change them nor does it directly alter life on Earth. Unlike citizens who pursue careers in law enforcement, diplomacy, or national security, astronomy attracts individuals who have no reason to expect that they will need to undergo invasive background checks or other personally invasive tests for their employment.

AAS members are united in their concern that certain rationales advanced by Petitioners could set an unduly broad precedent for a requirement of invasive background checks on astronomers. Petitioners suggest that the intrusive background investigations are justified by the "significant financial investment in JPL[.]" Petitioners' Br. 36. If the general principle that the government may impose such conditions simply to protect its investment in buildings, computers, or even salaries is accepted, this could affect virtually every research astronomer directly or indirectly. Petitioners also argue that intrusive investigations are justified by the government's interest as "an employer" (*id.* at 18, 33-34) – though admittedly "respondents are employees of contractors hired by the government, rather than civil service employees hired directly by the government[.]" *Id.* at 34 n.13. This rationale could be extended to a wide range of scientists who are not government employees, but whose research is supported by government funding. Such an expansion would magnify the effects of a broad ruling in this case. Because astronomy is so highly inter-connected and redundancy of data is rare, application to an even larger fraction of scientists, and the resulting increased loss of expertise and experience, could adversely affect all research astronomers.

To attract and retain the contributions of the best creative minds to research of national importance, the United States has long determined it is critical to foster a diversity of working environments. If all government-supported research were required to be done in the structured context of government

employment, the nation would fail to attract or fully develop the contributions of some of its best and most creative minds. Confirming that determination, scientists like the JPL researchers in this case have made historic contributions to the advance of knowledge working in a university-like environment which fosters free intellectual inquiry and respects individual privacy and autonomy. Preserving that environment, and the expectations of those who have made careers in it, thus advances compelling national interests. A tailored approach, which protects the government's legitimate interest in facility security while insulating researchers from unnecessary intrusion into their reasonable privacy expectations, is the surest way to protect the nation's investment in JPL.

In short, the imposition of unnecessarily intrusive background checks on all employees of federally supported institutions and observatories, or those receiving federal grants generally, could have a profound and disruptive impact on the astronomy community. The majority of astronomical research is supported, entirely or in part, through federal funding, with NASA providing the dominant source of funds. *See* note 2, *supra*. Any extension of this policy thus would impact a large fraction of the astronomers who are active in research and could substantially impact progress across our field.

II. Unnecessarily Intrusive Background Checks Will Adversely Affect U.S. Leadership in Astronomy

For the reasons specified above, much important research in astronomy requires access to space. Yet

primarily the federal government, predominantly through NASA and its centers, funds that research. Thus, policies that drive researchers away from NASA or its centers ultimately threaten U.S. leadership in astronomy. Many highly qualified researchers may opt to pursue other lines of research instead of subjecting themselves to the invasive background checks in question. This would ultimately jeopardize the U.S. leadership position in astronomy and space science research, to the detriment of both individual AAS members and the nation.

Additionally, astronomers are employed in large numbers at the National Observatories and other federally funded facilities, which could, through extension of this precedent, also become subject to background checks. Given the likely objections to these highly intrusive checks, it is clear that these institutions as well could see a reduction in the qualified staff choosing to work at these organizations. Such an exodus would have significant detrimental impact on the U.S. as a leader in the field of astronomical research.

III. Results Produced by NASA Missions Are Critical for the Field

Because of the unique role that NASA-generated data play in astronomical research, a policy that limits the talent involved with the NASA program could have a serious adverse effect on research in astronomy generally.

It is a policy of NASA that publicly funded data become public (or at least accessible to all qualified scientists) after a reasonable proprietary period,

typically six months. Also, NASA permits scientists to apply for usage time at its major space facilities on a competitive basis. Often, after an initial period where the mission developers have privileged access, the usage is mostly or entirely based on such competitive proposals. As a result, the majority of U.S. research astronomers work directly or indirectly with data obtained by U.S. space missions and many astronomers depend on such access for their research programs. In addition, small grants associated with obtaining "observing" time at a facility sustain many research programs and fund the graduate and undergraduate students who are the next generation of researchers.

Often, NASA missions provide the only access to observations in a particular part of the electromagnetic spectrum. While visible light and radio waves from space reach the Earth's surface and can be used to study astronomical objects from ground-based observatories, much of the infrared and ultraviolet spectrum and all X-rays and gamma-rays are stopped by Earth's atmosphere. To study these phenomena, astronomers need an observation post in space.

With the great cost of space missions, there is little duplication in capabilities in the missions of NASA. The only other option for obtaining data in a given wavelength band is by going through the (more limited) suite of space observatories operated by the European Space Agency and other national space programs. Indeed, with the high cost of space missions, many are now international collaborations and there is no redundancy of capability on planet Earth.

A specific example of this access policy in action is the Hubble Space Telescope, where the data are available and guest observer access is administered through the Space Telescope Science Institute in Maryland. Since this telescope went into operation, data from the telescope has been referenced in 10% of all papers published in *The Astrophysical Journal*, nearly all of which were authored by astronomers not working at the Space Telescope Science Institute. Thus the scientific impact of these centers reaches throughout our discipline.

Placing telescopes in space provides both better quality optical images (by getting above our turbulent atmosphere) and ultraviolet data that are not obtainable from any other source. Large and unique observatories administered through NASA include Einstein (X-rays), Spitzer (infrared), and Fermi (gamma-rays). Other key missions include WISE, the infrared survey mission specifically mentioned in the respondents' brief. Science centers for these have been set up on university campuses and/or at JPL. Each provides unique scientific access for U.S. scientists.

A project such as WISE at JPL will have a staff that ranges from tens to hundreds of individual scientists, engineers, and support staff. It will be broken into teams with particular responsibilities, e.g. for a particular detector or science goal, each team with a leader. Often, the project scientist or the team leaders are involved with the project for ten to twenty years, become the "corporate memory" knowing the reason for decisions that were made and priorities that were set, and provide leadership for the team. If one of these individuals leaves, it is

likely some of the team will also leave, and in any event, a new leader will need time to become as broadly familiar with the mission or task as his or her predecessor. Thus, loss of key personnel during development of a mission almost inevitably slows progress and increases the cost, even with the best of contingency planning and record keeping.

For the study of the solar system, NASA generally provides the only direct access through missions to planets, asteroids, comets, and to study the interplanetary medium and the solar wind. NASA also is responsible for missions to study the Sun, our nearest star, solar activity and its effects on the Earth and on manned space flight, through missions such as the Solar & Heliospheric Observatory ("SoHO") and the Solar Dynamics Observatory ("SDO").

Not only are there few missions, there are even fewer centers through which astronomers can be involved in mission planning and operations. The main such centers are the Space Telescope Science Center at Johns Hopkins University in Maryland, JPL at CalTech in California, and the Chandra and Spitzer centers at the Harvard / Smithsonian Center for Astrophysics in Massachusetts, plus NASA-operated Goddard space flight center also in Maryland. A NASA policy concerning access to these centers has the potential for affecting the ability of a large fraction of the U.S. astronomical community to carry out its frontier research efforts.

CONCLUSION

The Court should adopt a tailored approach and protect the careers of U.S. astronomers, to ensure the leadership of the U.S. in astronomical research and the continued expansion of human knowledge about the universe. Accordingly, the Court of Appeals' decision should be affirmed.

Respectfully submitted,

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Petitioners,

—v.—

ROBERT M. NELSON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY, WHICH THIS COURT HAS LONG RECOGNIZED, NECESSARILY INCLUDES HIGHLY PERSONAL AND INTIMATE DETAILS ABOUT MEDICAL TREATMENT AND PSYCHOLOGICAL COUNSELING. 6

A. The Right To Informational Privacy Is Well-Established 6

B. The Information Sought By The Government In This Case Is Protected By The Right To Informational Privacy.. 9

II. THERE IS NO MERIT TO THE GOVERNMENT'S CLAIM THAT THE RIGHT TO INFORMATIONAL PRIVACY IS ONLY THREATENED IF THE GOVERNMENT FURTHER DISSEMINATES THE HIGHLY PERSONAL AND INTIMATE INFORMATION THAT IT IS SEEKING FROM RESPONDENTS IN THIS CASE. 13

III. THE RIGHT TO INFORMATIONAL PRIVACY IS NOT WAIVED MERELY BECAUSE AN INDIVIDUAL CHOOSES TO SHARE SOME HIGHLY PERSONAL AND INTIMATE INFORMATION WITH SELECTED THIRD PARTIES. 21

IV. THE PRELIMINARY INJUNCTION SHOULD BE UPHELD. 24

CONCLUSION 29

TABLE OF AUTHORITIES

Cases

ACLU of Mississippi v. State of Mississippi,
911 F.2d 1066 (5th Cir. 1990) 15

Alexander v. Peffer, 993 F.2d 1348 (8th Cir. 1993).. 12

Barry v. City of New York,
712 F.2d 1554 (2d Cir.), *cert. denied*,
464 U.S. 1017 (1983) 8, 25, 26

Borucki v. Ryan, 827 F.2d 836 (1st Cir. 1987)..... 9

Denius v. Dunlap, 209 F.3d 944 (7th Cir. 2000).. 8, 15

Doe v. City of New York,
15 F.3d 264 (2d Cir. 1994) 10

Eagle v. Morgan,
88 F.3d 620 (8th Cir. 1996) 8, 10, 15

F.E.R. v. Valdez, 58 F.3d 1530 (10th Cir. 1995) 12

Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981) 8, 11

Ferm v. U.S. Trustee, 528 U.S. 1189 (2000)..... 8

Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia,
812 F.2d 105 (3d Cir. 1987)..... 10, 14, 24

H.L. v. Matheson, 450 U.S. 398 (1981)..... 7

In re Crawford,
194 F.3d 954 (9th Cir. 1999), *cert. denied* 8

J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981)..... 9

James v. City of Douglas,
941 F.2d 1539 (11th Cir. 1991) 8, 14

Mangels v. Pena, 789 F.2d 836 (10th Cir.1986)..... 25

McIntyre v. Ohio Elections Commission,
514 U.S. 334 (1995) 21

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 21

Nelson v. NASA,
530 F.3d 865 (9th Cir. 2008) 3, 22, 24

Nelson v. NASA, 568 F.3d 1028 (9th Cir. 2009) 4

New York v. Ferber, 458 U.S. 747 (1982) 7, 9

Nilson v. Layton City,
45 F.3d 369 (10th Cir. 1995) 8, 10, 25

Nixon v. Adm'r of Gen. Services,
433 U.S. 425 (1977) .....*passim*

Norman-Bloodsaw v. Lawrence Berkeley Laboratory,
135 F.3d 1260 (9th Cir. 1998) 12, 15

Pesce v. J. Sterling Morton High Sch.,
830 F.2d 789 (7th Cir. 1987) 14

Plante v. Gonzalez,
575 F.2d 1119 (5th Cir. 1978), *cert. denied*,
439 U.S. 1129 (1979) 26

Schaill by Kross v. Tippecanoe County School Corp.,
864 F.2d 1309 (7th Cir. 1988) 12

Smith v. Maryland, 442 U.S. 735 (1979) 22

Thorne v. City of El Segundo,
726 F.2d 459 (9th Cir. 1983) 14, 16, 25

U.S. Dept. of Defense v. Federal Labor Relations Authority, 510 U.S. 487 (1994) 23

U.S. Dept. of Justice v. Reporters Committee For Freedom of the Press, 489 U.S. 749 (1989) ..... *passim*

United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980) 8, 16

United States v. Miller, 425 U.S. 435 (1976) 22

United States v. Stevens, 130 S.Ct. 1577 (2010) 17

United States v. Westinghouse Electric Corp., 638 F.2d 570 (3d Cir. 1980) 8, 12, 26

Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990) 8, 10, 11

Whalen v. Roe, 429 U.S. 589 (1977) ..... *passim*

Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001) 17

Winter v. National Resources Defense Council, Inc., 129 S.Ct. 365 (2008) 3

Statutes

5 U.S.C. § 552(b)(6) (1976) 12

5 U.S.C. § 552a(a)(7) 17

5 U.S.C. § 552a(b)(3) 17

42 U.S.C. § 1320d-6 12

42 U.S.C. § 290dd-2 11

Cal. Evid. Code § 994. 11

Cal. Evid. Code § 1014. 11

Other Authorities

Charles Fried,
Privacy, 77 Yale L.J. 475 (1968) 9

Declan McCullagh, *IRS' Case of the Missing Laptops*, Wired Magazine, Jan. 10, 2002, *available at* http://www.wired.com/politics/law/news/2002/01/49615 19

GAO, *Information Security: IRS Needs to Address Pervasive Weaknesses*, GAO-08-211 (Jan. 8, 2008), *available at* http://www.gao.gov/cgi bin/getrpt?GAO-08-211 18

GAO, *Information Security: IRS Needs to Continue to Address Significant Weaknesses*, GAO-10-355 (Mar. 2010), *available at* http://www.gao.gov/new.items/d10355.pdf 19

Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1 (Sept. 26-27, 1974) 23

Louis Lasagna, *The Hippocratic Oath: Modern Version* (1964), *available at* http://www.pbs.org/wgbh/nova/doctors/oath_modern.html 11

Maria Shriver's Medical Records Leaked, CBS News, April 7, 2008, *available at* http://www.cbsnews.com/stories/2008/04/07/health/main3999244.shtml 20

Passport files of candidates breached, Associated Press, March 21, 2008, *available at* http://www.msnbc.msn.com/id/23736254/ 20

Peter P. Swire,
Peeping, 24 Berkeley Tech. L.J. 1167 (2009) 17

Press Release, Utah Governor Gary Herbert,
Investigation Into Alleged Immigrant List
Complete (July 20, 2010) 19

Privacy Rights Clearinghouse, *Chronology of Data
Breaches*, http://www.privacyrights.org/ar/Chron
DataBreaches.htm
(last modified July 25, 2010)..... 18

Randy Ludlow, *Checks on 'Joe' More Extensive Than
First Acknowledged*, Columbus Dispatch,
Oct. 29, 2008..... 20

U.S. General Accounting Office, *Information
Security: IRS Electronic Filing Systems*,
GAO-01-306 (Feb. 2001)..... 18

Wendy Thermos, *Officer Fired for Computer-
Snooping on VIPs*, Los Angeles Times,
Nov. 6, 2003..... 20

INTERESTS OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Southern California, the ACLU of Northern California, and the ACLU of San Diego and Imperial Counties are regional affiliates of the national ACLU. Founded in 1920, the ACLU has vigorously defended the right to privacy for almost 90 years and has appeared before this Court in numerous cases involving the right to privacy, both as direct counsel and as *amicus curiae*, including *Whalen v. Roe*, 429 U.S. 589 (1977).

STATEMENT OF THE CASE

Respondents are long-time employees of the California Institute of Technology ("Caltech") who work at the Jet Propulsion Laboratory ("JPL") pursuant to a contract between Caltech and NASA. Each of the Respondents works at what the government has characterized as "low-risk" and "non-sensitive" position.

After Respondents had been working without incident at JPL for varying lengths of time, NASA

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Respondents have lodged a blanket consent; Petitioners' consent has been submitted to the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

adopted a new policy requiring all JPL personnel, including "low-risk" employees like Respondents, to undergo a National Agency Check with Inquiries ("NACI"). As part of the NACI investigation, each employee must complete Standard Form 85 ("SF 85"). Among other things, SF 85 asks for disclosure of any illegal drug use or possession within the past year, along with information about the details of any treatment or counseling received for such use. *See* Joint Appendix ("JA") 88-95.

SF 85 also requires each employee to sign an "Authorization for Release of Information," JA 95, permitting the government to obtain "any information relating to [the employee's] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." *Id.* JPL then sends an "Investigative Request for Personal Information" ("Form 42") to the employee's references, past employers and landlords, which includes an open-ended request for any derogatory information that might affect the employee's suitability for employment. JA 96-97.

Based on the information it receives from the employee or obtains from other sources, NASA and the Office of Personnel Management determine whether the employee is suitable for employment. How suitability is determined is not clear from the record. Respondents have alleged that a document posted on JPL's internal website identified factors considered in the suitability determination. The factors include: "cohabitation," "carnal knowledge," "sodomy," "indecent proposals," "adultery,"

"illegitimate children," "voyeurism," "incest," "abusive language," "obscene telephone calls," "unlawful assembly," "attitude," "homosexuality ... when indications are present of possible susceptibility to coercion or blackmail," "physical health issues," "mental, emotional, psychological, or psychiatric issues," "issues ... that relate to an associate of the person under investigation," and "issues ... that relate to a relative of the person under investigation." JA 98-102.

Respondents brought an as-applied challenge to the constitutionality of this investigative process alleging, *inter alia*, that it violated their constitutional right to informational privacy. The district court denied Respondents' request for a preliminary injunction on the informational privacy claim, finding that they were unlikely to succeed on the merits and that there was no irreparable harm.

The Ninth Circuit reversed, concluding that Respondents had demonstrated "serious questions as to their informational privacy claim, and the balance of hardships tips sharply in their favor." *Nelson v. NASA*, 530 F.3d 865, 873 (9th Cir. 2008).[2] Given the limited record before it at this preliminary stage of the proceedings, the Ninth Circuit focused in particular on two aspects of the background

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[2] The panel opinion was written before this Court clarified the standards for a preliminary injunction in *Winter v. National Resources Defense Council, Inc.*, 129 S.Ct. 365 (2008). However, in her opinion concurring in the denial of the petition for rehearing, Judge Wardlaw made clear that the panel would have reached the same result "under *Winter*." 568 F.3d 1028, 1030 n.30 (9th Cir. 2008).

investigation: (1) SF-85's inquiry into drug treatment and counseling; and (2) Form 42's unbounded request for information. It then directed the district court on remand to fashion an appropriate preliminary injunction.

The government's request for rehearing *en banc* was denied. *Nelson v. NASA*, 568 F.3d 1028 (9th Cir. 2009). This Court subsequently granted *certiorari*.

SUMMARY OF ARGUMENT

The preliminary injunction ordered by the court of appeals in this case represents a tailored response to the serious constitutional issues raised by a program that requires private employees working with the federal government in "low-risk" and "non-sensitive" positions to disclose information about medical treatment and psychological counseling that they may have received in connection with illegal drug use, which they are also required to acknowledge. The government's interest in obtaining information about Respondents' medical treatment and psychological counseling is minimal and is not sufficient – under any standard of review – to overcome Respondents' right to keep this information private.

1. This Court has long recognized a constitutional right to informational privacy. *Whalen v. Roe*, 429 U.S. 589 (1977). Whatever the outer contours of that right, information about medical treatment and psychological counseling lies at its core. For more than three decades, lower courts interpreting *Whalen* have understood it to embrace

information that is highly personal and intimate. Medical treatment and psychological counseling easily meet that definition.

2. Contrary to the government's assertion, the right to information privacy is implicated whenever the government compels disclosure of highly personal and intimate information. The touchstones of the right to privacy are the right to be free from intrusion into one's private and personal affairs and the right to control one's personal information. Some information is so private and so personal that individuals should not be compelled to disclose it to anyone, including the government, absent an overriding governmental interest. Further disclosure by the government magnifies the privacy issue but it does not define it. Increasingly, moreover, the government is unable to preserve the confidentiality even of information that it is statutorily obligated to keep private. In a world of computer hackers, the safeguards of the Privacy Act have become substantially less secure.

3. Because the right to control one's personal information is central to the right to informational privacy, the right to privacy is not waived once information is shared with third parties. Indeed, the idea of control necessarily includes the right to make choices. Many people choose to share information about their medical or psychological treatment with close friends and relatives. That does not mean, and should not mean, that they forfeit the right to withhold the intimate details of their life from the government or anyone else.

4. On this preliminary injunction record, and applying any meaningful standard of review, the government has not justified its need to obtain details about the medical and psychological treatment of Respondents and those like them, who occupy "low risk" and "non-sensitive" positions at JPL. In particular, the government argues that employees with a history of illegal drug use are more likely to be deemed suitable for employment if the government knows they are undergoing medical treatment or psychological counseling. Even assuming that is so, the decision whether that benefit outweighs the loss of privacy should belong to the employee and not the government. In other words, this would be a very different case if the government offered employees an opportunity to share information about their medical treatment or psychological counseling, rather than demanding it.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY, WHICH THIS COURT HAS LONG RECOGNIZED, NECESSARILY INCLUDES HIGHLY PERSONAL AND INTIMATE DETAILS ABOUT MEDICAL TREATMENT AND PSYCHOLOGICAL COUNSELING.

A. The Right To Informational Privacy Is Well-Established.

This Court first articulated the right to informational privacy in *Whalen v. Roe*, 429 U.S. 589 (1977). As the Court explained in *Whalen*: "The

cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* at 598-600 (footnotes omitted).

The Court has reaffirmed that right on several occasions since. *See Nixon v. Adm'r of Gen. Services*, 433 U.S. 425, 457 (1977) (quoting *Whalen*'s description of the right to informational privacy); *U.S. Dept. of Justice v. Reporters Committee For Freedom of the Press*, 489 U.S. 749, 762 (1989) (same); *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982) (same). *See also H.L. v. Matheson*, 450 U.S. 398, 434-35 (1981) (Marshall, J., dissenting) (same).

As early as *Whalen*, moreover, this Court understood that the right to informational privacy is increasingly jeopardized by the rapid pace of technological change. More than three decades ago, the Court wrote: "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." 429 U.S. at 605. Justice Brennan was even more explicit, warning that "the central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information . . . ." *Id.* at 606. Twelve years later, the Court returned to this theme, noting that computer databases pose a threat to personal privacy that is qualitatively different than the "scattered disclosure" of personal

information in the pre-computer era. *See Reporters Committee*, 489 U.S. at 769-771.

Following this Court's lead, the courts of appeals have also recognized a right to informational privacy on numerous occasions. *See, e.g., Denius v. Dunlap*, 209 F.3d 944, 955 (7th Cir. 2000) ("The 'concept of ordered liberty' protected by the Fourteenth Amendment's Due Process Clause has been interpreted to include 'the individual interest in avoiding disclosure of personal matters.'") (internal citations omitted); *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (stating that the right's "existence is firmly established"), *cert. denied, Ferm v. U.S. Trustee*, 528 U.S. 1189 (2000); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) ("The Supreme Court has recognized that notions of substantive due process contained within the Fourteenth Amendment safeguard individuals from unwarranted governmental intrusions into their personal lives."); *James v. City of Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991) (rejecting qualified immunity defense because a reasonable official would have known about the clearly established constitutional right to keep personal matters private); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (recognizing existence of constitutional right to informational privacy); *Barry v. City of New York*, 712 F.2d 1554, 1558-59 (2d Cir.), *cert. denied*, 464 U.S. 1017 (1983) (same); *Nilson v. Layton City*, 45 F.3d 369, 371-72 (10th Cir. 1995) (same); *Fadjo v. Coon*, 633 F.2d 1172, 1175-76 (5th Cir. 1981) (same); *United States v. Hubbard*, 650 F.2d 293, 304-06 (D.C. Cir. 1980) (same); *United States v. Westinghouse*

Electric Corp., 638 F.2d 570, 577 (3d Cir. 1980) (same).[3]

Today, more than ever, the right to informational privacy is essential to our concept of human dignity and personal autonomy. In the Information Age, it protects the right of "individuals ... to determine for themselves when, how, and to what extent information about them is communicated to others". *Reporters Committee*, 489 U.S. at 764 n.16 (1989) (quoting Alan F. Westin, Privacy and Freedom 7 (Atheneum 1967)).[4]

B. The Information Sought By The Government In This Case Is Protected By The Right To Informational Privacy

The right to informational privacy is well-established; its outer boundaries are less so. Wherever those outer boundaries may lie, however,

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[3] The only court of appeals to conclude that there is not a constitutional right to informational privacy is the Sixth Circuit, *see J.P. v. DeSanti*, 653 F.2d 1080, 1089-90 (6th Cir. 1981), in a case decided before this Court reiterated the right in *Reporters Committee* and *Ferber*, and before many of the appellate decisions cited above. The First Circuit has stated that the existence of the right is an open question, but has declined to resolve the issue. *Borucki v. Ryan*, 827 F.2d 836 (1st Cir. 1987).

[4] "Privacy, thus, is control over knowledge about oneself. But it is not simply control over the quantity of information abroad; there are modulations in the quality of the knowledge as well. We may not mind that a person knows a general fact about us, and yet feel our privacy invaded if he knows the details." Charles Fried, *Privacy*, 77 Yale L.J. 475, 483 (1968) (footnote omitted).

requiring individuals to disclose highly personal and intimate details about their medical history and psychological counseling undeniably strikes at the heart of the right to informational privacy. *See, e.g., Whalen*, 429 U.S. at 599 (holding that the right applies to "personal matters"); *Nixon*, 433 U.S. at 457 (same); *Eagle*, 88 F.3d at 625 (the "right to confidentiality . . . extends only to highly personal matters representing 'the most intimate aspects of human affairs'"); *Nilson*, 45 F.3d at 372 (10th Cir. 1995) (right extends to information that is "highly personal or intimate"); *Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir. 1994) (extending the right to cover medical information because the plaintiff's medical condition "is a matter that he is normally entitled to keep private"); *Walls*, 895 F.2d at 192 ("Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy."); *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 112-13, 116 (3d Cir. 1987) (holding that the right covers information "within an individual's reasonable expectations of confidentiality"; the "more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny"; "[w]hen the information is inherently private, it is entitled to protection").

Different courts have, admittedly, used different formulations to describe the scope of the informational privacy right. But the government's argument does not rest on any of these linguistic differences, which are ultimately minor and have no

impact on this case. Instead, the government argues that the right to informational privacy should be limited to "core matters that themselves trigger constitutional protections," Pet. Br. at 52. The flaw in that approach was succinctly summarized by the Fourth Circuit: "There are . . . matters which fall within a protected zone of privacy simply because they are private . . . These private matters do not necessarily relate to the exercise of substantive rights, but may simply constitute areas of one's life where the government simply has no legitimate interest." *Walls*, 895 F.2d at 193 (internal citations omitted). *See also Fadjo*, 633 F.2d at 1176 (holding that the right to confidentiality extends beyond matters already separately protected).

Medical treatment and psychological counseling are undeniably private in this sense. The information revealed to one's doctor or therapist is, by definition, personal and intimate. It is up to the patient to determine how broadly that information is disseminated. For that reason, the information is protected by evidentiary privileges[5] and by professional ethics.[6]

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[5] *See, e.g.*, Cal. Evid. Code § 994 (physician-patient communications privileged) and § 1014 (psychotherapist-patient communications privileged) *See also* 42 U.S.C. § 290dd-2 (drug treatment records maintained by any program or activity "conducted, regulated, or directly or indirectly assisted by any department or agency of the United States" shall be treated as confidential).

[6] The Hippocratic Oath states: "I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know." *See* Louis Lasagna, *The Hippocratic Oath:*

Recognizing how private and personal this information is, the courts of appeals have consistently held that medical information is covered by the informational privacy right. *See, e.g., Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("One can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up."); *F.E.R. v. Valdez*, 58 F.3d 1530, 1535 (10th Cir. 1995) (extending privacy protection to medical information); *City of New York*, 15 F.3d 267 (same); *Alexander v. Peffer*, 993 F.2d 1348, 1351 (8th Cir. 1993) (same); *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1322 n.19 (7th Cir. 1988) (same); *Westinghouse Elec. Corp.*, 638 F.2d at 577 (same).

Congress has likewise determined that medical information implicates significant privacy concerns. *See, e.g.*, 5 U.S.C. § 552(b)(6) (1976) (exempting "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" from the Freedom of Information Act); Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d-6 (establishing protections for medical records). Indeed, the Privacy Rule to HIPAA makes clear that individuals must be given access to all of their medical records, and that health care providers and insurance plans cannot use

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Modern Version (1964), *available at* http://www.pbs.org/wgbh/nova/doctors/oath_modern.html.

or disclose information regarding treatment or health care operations absent consent from the individual patient, except in a few specified situations. HIPAA, Privacy Rule, 45 C.F.R. § 164.502.

II. THERE IS NO MERIT TO THE GOVERNMENT'S CLAIM THAT THE RIGHT TO INFORMATIONAL PRIVACY IS ONLY THREATENED IF THE GOVERNMENT FURTHER DISSEMINATES THE HIGHLY PERSONAL AND INTIMATE INFORMATION THAT IT IS SEEKING FROM RESPONDENTS IN THIS CASE.

The government contends that "[c]onstitutional [p]rivacy [c]oncerns [a]re [n]ot [t]riggered [m]erely [b]ecause [t]he [g]overnment [c]ollects [i]nformation [a]bout [a]n [i]ndividual." Pet. Br. at 21. To the extent the government is collecting information that is highly personal and intimate as a condition of employment, that claim should be rejected.

As previously noted, the right to informational privacy rests on the premise that individuals are entitled to control whether, how, and to whom their personal information is disclosed. *See* p.9, *supra*. By forcing Respondents to disclose details of their medical treatment and psychological counseling, the

government is depriving them of the right to make those determinations.[7]

Any later dissemination of that information by the government may constitute a further violation of the informational privacy right, but it is not a necessary ingredient of the claim. As the Eleventh Circuit observed: "This argument misses the point. The inquiry is whether there is a legitimate state interest in disclosure that outweighs the threat to the plaintiff's privacy interest. The answer to that inquiry does not depend upon whether the person to whom disclosure was made is a state official or a member of the general public." *James*, 941 F.2d at 1544.

Contrary to the government's assertion, neither *Whalen* nor *Nixon* suggest that the right to informational privacy is limited to the government's dissemination of highly personal and intimate

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[7] That employees are not literally compelled to provide their private information – i.e., that they have the alternative of finding a new job – does not mean that they have waived their informational privacy rights. "Tests applied as a prerequisite for continued employment are hardly to be considered voluntary." *Fraternal Order*, 812 F.2d at 111-12. Government employees cannot be forced to choose between their job and their constitutional rights. *See, e.g., Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 797 (7th Cir. 1987) ("[T]he federal right of confidentiality might in some circumstances be implicated when a state conditions continued employment on the disclosure of private information."); *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983) ("A potential employee of the state may not be required to forego his or her constitutionally protected rights simply to gain the benefits of state employment.").

information. Although the Court found in those cases that the collection of information by the government did not violate the right to informational privacy, the Court reached that conclusion not because the only disclosure was to the government, but because the government's interests were sufficient to outweigh the privacy interests. *Whalen* makes clear that the informational privacy right involves "the individual interest in avoiding disclosure of personal matters." *Whalen*, 429 U.S. at 599. It does not say "the individual interest in avoiding *governmental* disclosure," which is how the government would like it read. If it did, *Whalen* and *Nixon* would have been much shorter decisions because the fact that there was no governmental disclosure would have been determinative.

The government's narrow reading of *Whalen* and *Nixon* is unsupported by the case law. *See, e.g., Denius*, 209 F.3d at 956-57 (finding a violation of the right to informational privacy in the context of a background check where the government was merely collecting information); *Norman-Bloodsaw*, 135 F.3d at 1269 (sustaining informational privacy claim without any allegation that the government might ultimately publish the collected private information); *Eagle*, 88 F.3d at 627 ("Years ago, at what might now be considered the dawn of the technological revolution, the Supreme Court foresaw on the horizon abuses that might emanate from governmental collection of vast amounts of personal data."); *ACLU of Mississippi v. State of Mississippi*, 911 F.2d 1066, 1069-70 (5th Cir. 1990) (holding that the right includes the "right to be free" both from

"the government disclosing private facts about its citizens" and from "the government inquiring into matters in which it does not have a legitimate and proper concern") (internal quotation omitted) (emphasis omitted); *Thorne*, 726 F.2d 459, 469-72 (holding that the questioning of a police job applicant violated her right to privacy); *Hubbard*, 650 F.2d at 305 (stating that protection from both the collection of private information by the government and subsequent disclosure by the government are necessary to preserve fundamental privacy interests).

More fundamentally, the government's assertion that the right to informational privacy is not implicated by compelled disclosure to the government is really an argument against the very concept of a right to privacy. Under the government's theory, it would be permissible for the government to collect all sorts of private and highly sensitive information, even in the absence of any proven need, so long as the government did not subsequently disclose the information publicly. That is clearly not the law. Regardless of how widely it is shared, for many people there is some information – like information about their medical treatment and counseling – that is so profoundly private, intimate and sensitive that they do not want to be compelled to disclose it to anyone, including the government. The right to informational privacy is

about control over personal information, not its misuse.[8]

The government's reliance on the Privacy Act is therefore misplaced. The Privacy Act only limits disclosure by the government; it does nothing to mitigate the privacy concerns raised by collection of the information in the first place. Thus, it is not coextensive with the right to informational privacy. Additionally, the Privacy Act has numerous exceptions, including one that permits disclosure for "routine use," 5 U.S.C. § 552a(b)(3), broadly defined to mean any use that is "compatible with the purpose for which it was collected," 5 U.S.C. § 552a(a)(7).

Notwithstanding the Privacy Act, moreover, there have recently been numerous high-profile incidents in which, despite government's best efforts and best intentions, highly personal and sensitive information collected by the government has been disclosed. *See, e.g.*, Peter P. Swire, *Peeping*, 24 Berkeley Tech. L.J. 1167 (2009) (discussing numerous examples of recent disclosures of confidential information, including accidental data leaks, improper access or fraud by insiders, and other

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[8] In any event, this Court has been properly skeptical of government claims that constitutional rights should be left to the government's good intentions. *See United States v. Stevens*, 130 S.Ct. 1577, 1591 (2010) ("But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the government promised to use it responsibly.") (citing *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001) (involving a non-First Amendment constitutional challenge).

failures of security within government and the private sector); Privacy Rights Clearinghouse, *Chronology of Data Breaches*, http://www.privacyrights.org/ar/ChronDataBreaches.htm (last modified July 25, 2010) (compiling a list of incidents of insider theft, fraud, hacking, break-ins, lost hard drives, and accidental disclosures of personal information from governmental institutions and the private sector from January 2005-present; as of July 2010, this list details 494 million records that have been lost).

The Internal Revenue Service, which possesses a significant amount of sensitive data, vividly illustrates this problem.[9] The General Accounting Office has chronicled continuing privacy and security problems at the IRS over the last decade, despite the IRS's strict rules regarding the confidentiality of taxpayer information and its best efforts at securing the information. *See, e.g.*, U.S. General Accounting Office, *Information Security: IRS Electronic Filing Systems*, GAO-01-306 (Feb. 2001), *available at* http://www.gao.gov/new.items/d01306.pdf (finding that in 2001, the agency's computer systems were highly insecure and vulnerable); GAO, *Information Security: IRS Needs to Address Pervasive Weaknesses*, GAO-08-211 (Jan. 8, 2008),

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[9] *Amici* do not suggest that the IRS's collection of personal financial information violates the right to informational privacy, as the need for that information is clear. *Amici* discuss the IRS solely to illustrate the potential privacy problems that can arise when government entities collect highly personal information, despite their best efforts to safeguard the information.

available at http://www.gao.gov/cgi-bin/getrpt?GAO-08-211 (finding that as of 2008, "significant weaknesses in various controls continue to threaten the confidentiality and availability of IRS's financial processing systems and information . . . about 70 percent of the previously identified information security weaknesses remain unresolved."); GAO, *Information Security: IRS Needs to Continue to Address Significant Weaknesses*, GAO-10-355 (Mar. 2010), *available at* http://www.gao.gov/new.items/d10355.pdf (finding that as of 2010, 69 percent of the previously identified security weaknesses in key systems had still not been addressed). The Treasury Department's Inspector General similarly found that the IRS had lost or misplaced 2,332 laptop computers, desktop computers and servers containing sensitive information over a three-year period. Declan McCullagh, *IRS' Case of the Missing Laptops*, Wired Magazine, Jan. 10, 2002, *available at* http://www.wired.com/politics/law/news/2002/01/49615.

The IRS is not alone. Just last month, it was revealed that information from a database maintained by the State of Utah regarding the alleged immigration status of thousands of individuals was improperly accessed and publicly disclosed. *See, e.g.*, Press Release, Utah Governor Gary Herbert, Investigation Into Alleged Immigrant List Complete (July 20, 2010), *available at* http://www.utah.gov/governor/news_media/article.html?article=3321. In another highly publicized incident, two contract workers at the State Department were fired in 2008 for reading passport

information belonging to then-presidential candidates Barack Obama, John McCain, and Hillary Clinton. *Passport files of candidates breached*, Associated Press, March 21, 2008, *available at* http://www.msnbc.msn.com/id/23736254/. Samuel Joseph Wurzelbacher, aka "Joe the Plumber," similarly had his government records improperly accessed by employees at several Ohio state agencies. Randy Ludlow, *Checks on 'Joe' More Extensive Than First Acknowledged*, Columbus Dispatch, Oct. 29, 2008, *available at* http://www.dispatch.com/live/content/local_news/stories/2008/10/29/joe30.html.

Medical information has also been improperly accessed and disclosed from government databases on numerous occasions. *See, e.g.*, Wendy Thermos, *Officer Fired for Computer-Snooping on VIPs*, Los Angeles Times, Nov. 6, 2003, *available at* http://articles.latimes.com/2003/nov/06/local/mechriman6 (discussing the firing of a California police officer for obtaining confidential information from police databases on a variety of celebrities); *Maria Shriver's Medical Records Leaked*, CBS News, April 7, 2008, *available at* http://www.cbsnews.com/stories/2008/04/07/health/main3999244.shtml (detailing how an employee at the UCLA Medical Center improperly accessed medical information about California First Lady Maria Shriver and over thirty other prominent people and celebrities, some of which was later leaked to the media).

At a minimum, this troubling history of unauthorized disclosures highlights the importance of requiring the government to demonstrate its need

for the sort of highly personal and intimate information it is requesting from Respondents in this case.

III. THE RIGHT TO INFORMATIONAL PRIVACY IS NOT WAIVED MERELY BECAUSE AN INDIVIDUAL CHOOSES TO SHARE SOME HIGHLY PERSONAL AND INTIMATE INFORMATION WITH SELECTED THIRD PARTIES.

The government also attempts to limit the informational privacy right by claiming that "the fact that an individual has already revealed information to others means that it is no longer 'private' in the constitutional sense." Pet. Br., 52-53. That argument cannot be accepted without eviscerating the right to informational privacy.

Information that is already known by third-parties can still merit constitutional protection from compelled disclosure to the government. *See, e.g., McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995) (holding that leafletter had constitutional right to engage in anonymous speech, even though her printer and other third-parties knew her identity); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459-60 (1958) (holding that membership lists are constitutionally protected regardless of fact that third-parties knew the members' "private" information). If not, there would be almost no information that would be protected by the right to privacy and, thus, no such right.

For example, there would be no right of privacy in any medical information, including the

most personal and sensitive information imaginable, because someone else – the doctor – would know that information. There would be no right of privacy protecting one's sexual activities or proclivities, because someone else – one's sexual partner – would be privy to that information. Indeed, if the privacy right did not cover any information that others know about – which is what the government asserts – then there would have been no right to privacy in President Nixon's personal communications, because third-parties – the people he communicated with – were privy to the contents of those communications. The Court reached the opposite conclusion in *Nixon*, holding that President Nixon had a legitimate expectation of privacy in those communications. *Nixon*, 433 U.S. at 457-58.

The court of appeals properly recognized these principles, rejecting the government's argument and holding that the third-party doctrine applies only in the Fourth Amendment context, where the focus is on the reasonableness of the manner in which information is sought, not on the particular nature of the information itself. *Nelson*, 530 F.3d at 880 n.5 ("[T]he right to informational privacy differs from the Fourth Amendment which, as a bright-line rule, 'does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities' . . . We think it is clear, however, that the 'legitimate expectation of privacy' described in this context is a term of art used only to define a 'search' under the Fourth Amendment, and [*United States v. Miller*, 425 U.S. 435 (1976)] and [*Smith v. Maryland*, 442 U.S. 735 (1979)] do not

preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters.") (internal citations omitted) (emphasis in original).

In *Reporters Committee*, the Court rejected a similar argument that the fact that information has been previously disclosed means that no privacy rights exist. 489 U.S. at 762-63 ("We reject respondents' cramped notion of personal privacy."). The Court reached that conclusion, in part, from its recognition that, "in an organized society, there are few facts that are not at one time or another divulged to another." *Id.* at 763. As the Court explained, the key to privacy is not whether the information has previously been revealed; the focus is on how sensitive and personal the information itself is. *Id.* at 770 ("In sum, the fact that 'an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'") (quoting Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, p. 13 (Sept. 26-27, 1974)).[10]

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[10] *See also U.S. Dept. of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994) ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."). Although *Reporters Committee* was a FOIA case, a distinction the Court noted might matter in some situations, 489 U.S. at 762 n. 13, its insights into privacy are equally relevant in the constitutional context when, as here, the information being sought was never in the public record.

As in *Reporters Committee*, the government's attempt to expand the third-party doctrine to limit the informational privacy right represents a "cramped notion of personal privacy." *Reporters Comm.*, 489 U.S. at 762-63. It was properly rejected by the court below and should likewise be rejected by this Court.

IV. THE PRELIMINARY INJUNCTION SHOULD BE UPHELD.

Because this case involves matters clearly embraced by the right to informational privacy, the government's interest in requiring disclosure of the private information must be balanced against Respondents' interest in confidentiality. *See Nixon*, 433 U.S. at 457-58 (balancing the former President's privacy interest in his personal papers against the public interest in subjecting all of his papers to archival screening).

In conducting that balancing, the majority of courts have applied a form of intermediate scrutiny, similar to the test used by the Ninth Circuit in this case. *See, e.g., Nelson*, 530 F.3d at 877 ("If the government's actions compel disclosure of private information, it 'has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest.' We must 'balance the government's interest in having or using the information against the individual's interest in denying access.'") (citations omitted); *Fraternal Order*, 812 F.2d at 110 ("Most circuits appear to apply an 'intermediate standard of review' for the

majority of confidentiality violations.") (citation omitted); *Barry*, 712 F.2d at 1559 (same).

Other courts have applied a form of strict scrutiny, requiring the government to demonstrate a compelling interest. *See, e.g., Mangels v. Pena*, 789 F.2d 836, 839 (10th Cir. 1986) (noting that a compelling interest analysis is applied for informational privacy claims); *Nilson*, 45 F.3d at 371 (analyzing whether disclosure of information can be done in the "least intrusive manner"); *Thorne*, 726 F.2d at 469 (stating that a compelling interest analysis should be used for severe intrusions on confidentiality). *See also Whalen*, 429 U.S. at 607 (Brennan, J., concurring) ("a statute that did effect such a [serious] deprivation would only be consistent with the Constitution if it were necessary to promote a compelling state interest").

As in this case, the courts applying intermediate scrutiny have looked to a number of factors to determine if the right was violated:

> The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate,

> articulated public policy, or other recognizable public interest militating toward access.

Westinghouse Elec. Corp., 638 F.2d at 578; *see also Doe v. Att'y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991) (quoting *Westinghouse*). The government does not address these cases or the standards of review applied by the various courts of appeal. Instead, the government suggests that courts should defer to its determination that it needs the requested information. Pet. Br., 44 ("the courts should not second-guess the government's judgment about the need for information about recent drug use"); *id.* at 49 (the court of appeals "erred in articulating an *ad hoc* balancing test for determining if the Constitution is violated by particular inquiries"). There is no basis for that position.

Because constitutional rights are at stake, heightened scrutiny should be applied to determine whether an individual's constitutional right to informational privacy has been violated. *See, e.g., Barry*, 712 F.2d at 1559 (stating that the Supreme Court has recognized "that some form of scrutiny beyond rational relation is necessary to safeguard the confidentiality interest"); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979) ("The Supreme Court has clearly recognized that the privacy of one's personal affairs is protected by the Constitution. Something more than mere rationality must be demonstrated.").

The Court need not now determine whether intermediate scrutiny or strict scrutiny should be applied, however. Under either standard, the

government has failed to justify its requirement that Respondents provide details of any drug treatment and counseling they may have received.

The government asserts two purported interests in obtaining this information. First, it claims the information is necessary to determine if the Caltech employees are not suitable for employment or not safe to access its facilities. Pet. Br., 42-43. Second, the government claims that "[k]nowing about an employee's drug treatment also may help the government avoid disability discrimination." *Id.* at 43. Neither of these interests is sufficient to force individuals to relinquish their right to privacy.

With regard to the first asserted interest, the government's only argument is that knowing about Respondents' "'treatment or counseling received for illegal drug use * * * *lessen[s]* the government's concerns regarding the underlying activity.'" Pet. Br., 43 (quoting the Ninth Circuit decision) (emphasis in original). If that is true, then there is no reason to deny Respondents their constitutional right to decide whether to reveal that information to the government. The fact that disclosure to the government may be helpful to some employees in some circumstances does not mean that the government can compel disclosure from all employees in all circumstances.

The government's second asserted interest is equally empty. Arguing that it needs to know about Respondents' treatment and counseling to avoid engaging in disability discrimination is the equivalent of the government saying that it needs to

ask about a job applicant's religion so that it can avoid a religious discrimination lawsuit. That is obviously not permissible, and reveals just how thin the government's interests are in obtaining this information.

Because the government has not articulated any legitimate interests that will actually be furthered by forcing Respondents to disclose their highly sensitive medical treatment and counseling information, the government's demand for that information was properly enjoined.[11]

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[11] The court of appeals also concluded that the government had failed to justify the broad and open-ended questions set forth in Form 42, or provide any standards that might limit their reach. We agree. In addition, we share Respondents' concern about the breadth of the blanket authorization and release of information required by SF 85, but do not brief that issue here.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION, *et al.*,

Petitioners,

v.

ROBERT M. NELSON, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE OPEN-ENDED QUESTIONS ON FORM 42 AND SUBSEQUENT INTERVIEWS GREATLY EXCEED PERMISSIBLE INQUIRIES ABOUT CURRENT EMPLOYEES USED OR AVAILABLE TO PRIVATE EMPLOYERS 3

A. The Form 42 Inquiries Must Be Examined in Their Context; Respondents Are Current Employees Not Applicants Of A Private Sector Employer 3

B. The Government's Argument That Such Inquiries Are Lawful Based On Investigations of Government Employees Or Job Applicants Generally Is Irrelevant 4

II. OPEN-ENDED QUESTIONS, WHERE USED IN PRIVATE SECTOR BACKGROUND CHECKS, ARE NARROWLY DRAWN AND TIED TO LAWFUL INQUIRIES OF JOB RELATED MATTERS 4

III. FORM 42'S OPEN-ENDED QUESTIONS AND THE FOLLOW-UP INTERVIEWS ARE SUBSTANTIALLY LIKELY TO ELICIT INFORMATION IRRELEVANT TO ANY LEGITIMATE GOVERNMENT INTEREST..... 6

A. The Form 42 Instructions to Recipients are Wrong in that Respondents are Not Seeking Government Employment 7

B. Recipients of Form 42 Must Guess at What "Suitability for a Security Clearance" Means 8

IV. FORM 42'S OPEN-ENDED QUESTIONS AND THE FOLLOW-UP INTERVIEWS ARE SUBSTANTIALLY LIKELY TO ELICIT INFORMATION WHICH VIOLATES FEDERAL AND STATE STATUTES FORBIDDING DISCLOSURE 8

A. The Americans with Disabilities Act 8

B. Title VII of the Civil Rights Act 10

C. The Fair Credit Reporting Act 11

D. State Law 12

E. Tort Liability 12

V. THE GOVERNMENT'S CITED EXPERT AUTHORITIES DO NOT SUPPORT OPEN-ENDED QUESTIONS NOT TETHERED TO LAWFUL INQUIRY 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES:

Acuff v. IBP, Inc., 777 F. Supp. 2d 914 (C. D. Ill. 1999) 13

Cossette v. Minnesota Power & Light, 188 F. 3d 964 (8th Cir. 1999) 9

Griffin v Steeltek, Inc., 160 F. 3d 591 (10th Cir. 1998) 8

Nathanson v. Medical College of Pennsylvania, 926 F. 2d 1368 (3d Cir. 1991) 9

Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F. 3d 1221 (10th Cir. 1997) 8

STATUTES:

15 U.S.C. §1681,*et seq.* 11

42 U.S.C. §§2000e et.seq 10

42 U.S.C. §2000e(k) 10

42 U.S.C. §§2000e-2 10

42 U.S.C. §12102(1)(B) 9

42 U.S.C. §12112(d)(4) 8

42 U.S.C. §12112(d)(4)(B) 9

42 U.S.C. §12112(b)(2) 9

California Government Code §12940(f) 12

REGULATIONS:

29 C.F.R. §1630.2(g) 9

29 C.F.R. §1630.13(a), (b) 3

29 C.F.R. §1630.14 9

29 C.F.R. §1630.14(a), (b) and (c) 3

29 C.F.R. §1630.13(b) 9

TREATISES

Restatement (Second) of Torts 13

MISCELLANEOUS:

Barada & Laughlin, Reference Checking for Everyone: What You Need to Know to Protect Yourself, Your Business and Your Family (2004) 5, 14-15

Muller, The Managers Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need to Know (2009) 5, 14

Dickinson, Hiring Smart: How to Conduct Background Checks (1997) 5, 14

INTEREST OF AMICUS CURIAE

The California Employment Lawyers Association ("CELA") is a statewide affiliate of the National Employment Lawyers Association ("NELA") and represents over 900 lawyers, law clerks, paralegals, mediators and arbitrators who practice employment law in California. CELA represents its members in advocacy, litigation and education in all areas of employment law including privacy issues affecting public and private sector employees. CELA submits this amicus brief in support of Respondents.[1]

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1 No counsel for a party authored this brief in whole or in part and no such counsel, party or person other than amicus curiae, their members or their counsel, made a monetary contribution to fund its preparation and submission. The parties were notified and consented to the filing of this brief.

SUMMARY OF ARGUMENT

Petitioners aver that the open-ended inquiries on Form 42 and the related interviews are not essentially different from what routinely occur in the private sector. (Pet. Br. 38, 45). The reality is that private sector employers face severe legal and practical limitations in employee inquiries and reference interviews. Utterly prohibited and typically avoided are the sort of sweeping boundless questions that could easily and forseeably invite information having nothing to do with performance in the workplace. This is exactly the problem with the scope of the government's queries here, and why private sector employers are well-advised not to engage in the kinds of questions and interviews used to evaluate Respondents here.

ARGUMENT

I. THE OPEN-ENDED QUESTIONS ON FORM 42 AND SUBSEQUENT INTERVIEWS GREATLY EXCEED PERMISSIBLE INQUIRIES ABOUT CURRENT EMPLOYEES USED OR AVAILABLE TO PRIVATE EMPLOYERS.

A. The Form 42 Inquiries Must Be Examined In Their Context: Respondents Are Current Employees Not Applicants of A Private Sector Employer.

Petitioners' brief blurs important distinctions about the status of Respondents. In the employment context, whether one is a current employee or a job applicant bears significantly on what type and level of employer investigation is permissible. Compare the medical inquiries available under 29 C.F.R. § 1630.13(a) (applicants) with (b) (employees) and 1630.14(a) and (b) (applicants) with (c) (employees).

The relevant inquiry in this case concerns what investigation is permitted into the backgrounds and lives of current employees against whom there has been no allegation of misconduct, poor job performance, drug usage, workplace sexual impropriety or government risk. Notwithstanding the implications of low level security clearance and work on a government contract discussed in

Res. Br. 46-48, Respondents are private sector not government employees into whose lives employers have limited access. Respondents have neither bargained away their privacy rights to obtain government employment nor acquiesced to any sweeping government investigation by waiving rights to gain contract work.

B. The Government's Argument That Such Inquiries Are Lawful Based On Investigations of Government Employees Or Job Applicants Generally Is Irrelevant.

Much of the government's brief analyses, without distinction, governmental investigation into applicants for government employment (Pet. Br. 35) or background investigations of job applicants in the public and private sector generally. (Pet. Br. 34-35, 45.) These points are irrelevant. The proper focus is on current employees, working for a private sector employer under a government contract.

II. OPEN-ENDED QUESTIONS, WHERE USED IN PRIVATE SECTOR BACKGROUND CHECKS, ARE NARROWLY DRAWN AND TIED TO LAWFUL INQUIRIES OF JOB-RELATED MATTERS

As explained *infra*, private sector employer inquiries into the backgrounds, health and lives of current employees are very circumscribed. Federal,

state and common law create a matrix of limitations on any such inquiry. Employers cannot cast a net of open-ended questions, such as those contained in Form 42, in the hopes that some lawful or usable information may be captured along with everything else. Regardless of whether the employer acts on information irrelevant to lawful concerns in the workplace, the damage is done through the very acquisition of non-work-related information.

For that reason, employers tailor their inquiries narrowly to elicit only legally permissible information. The issue is not whether to use open-ended questions, common in the workplace, but whether or not such questions are designed to elicit lawful performance-based responses. Even the human resource sources referenced by Petitioners caution employers to ask only validly job-related questions. See Barada & Laughlin, *Reference Checking For Everyone: What You Need to Know to Protect Yourself, Your Business and Your Family* (2004) pp. 52-53 ("Put in the most simple terms, if the question has nothing to do with job performance, don't ask it."); Muller, *The Managers Guide to HR: Hiring, Firing, Performance Evaluations, Documentation, Benefits, and Everything Else You Need To Know* (2009) pp. 204-205 (identifying "the okay four" questions which an employer can answer about a previous employee); Dickinson, *Hiring Smart: How to Conduct Background Checks* (1997) pp. 67-68 ("Do not ask questions about or that in-

vite comments regarding – race, sex, religion, national origin, disabilities or age, military service, bankruptcy, garnishments, discrimination complaints or lawsuits, union activities, sympathies etc." and with personal references "avoid topics implicating discrimination issues, such as religious affiliations, child care responsibilities, sexual orientation, prior arrests, use of alcohol, past drug use or known disabilities."

III. FORM 42'S OPEN-ENDED QUESTIONS AND THE FOLLOW-UP INTERVIEWS ARE SUBSTANTIALLY LIKELY TO ELICIT INFORMATION IRRELEVANT TO ANY LEGITIMATE GOVERNMENT INTEREST

A. The Form 42 Instructions to Recipients are Wrong in that Respondents are Not Seeking Government Employment.

Question 8 on Form 42 erroneously asks the recipient to provide information as to the person's suitability for government employment. Clearly this is wrong as applied to Respondents. Forseeably a reference pondering government employment would likely respond differently and with a heightened sense of caution than if requested to provide information on a private sector employee working with a low level security clearance on a government contract.

B. Recipients of Form 42 Must Guess at What "Suitability for a Security Clearance" Means

In addition to inaccuracy, Form 42 provides no definitions, standards or criteria for response. Recipients may or may not have any idea what the term "suitability for security clearance" means nor are they told that the Respondents have low level security clearance and what that means.

Form 42 thus begs the question for each recipient of what character, background, personal life or other characteristic he or she thinks a person should have to be suitable for government employment or to gain a security clearance (level unspecified). One can easily imagine one's prejudices or misinformation coloring these judgments. Gays and Lesbians could be susceptible to blackmail and therefore a security risk; Muslims could have sympathy for terrorists and therefore are not suitable; America is a Christian nation so all government employees with security clearances should be practicing Christians; a person with a given disease or disability is unsuitable; and a myriad of other impermissible criteria.

IV. FORM 42'S OPEN-ENDED QUESTIONS AND THE FOLLOW-UP INTERVIEWS ARE SUBSTANTIALLY LIKELY TO ELICIT INFORMATION WHICH VIOLATES FEDERAL AND STATE STATUTES FORBIDDING DISCLOSURE

As explained below, questions which are likely to elicit information either not bearing on job performance or protected from disclosure are beyond the pale of lawful employer inquiry. In the world of private employment, questions 6, 7 and 8 on Form 42 would never be asked because of the inherent likelihood that private, legally prohibited information would be revealed.

A. The Americans with Disabilities Act

The Americans with Disabilities Act ("ADA") severely limits what an employer may learn about current employees either through inquiry or examination. § 102(c)(4) of the Act provides that covered entities shall not inquire whether an employee is an individual with a disability, or ask about the nature or severity of the disability, unless such inquiry is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4). *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F. 3d 1221, 1229-31 (10th Cir. 1997) (inquiring what prescribed drugs employees are using violates ADA); *Griffin v. Steeltek, Inc.*, 160 F. 3d 591, 593-

594 (10th Cir. 1998) (asking prospective employee about prior workers compensation claims or disability benefits violated ADA); *Cossette v. Minnesota Power & Light*, 188 F. 3d 964, 968-9 (8th Cir. 1999) (liability of past employer for sharing confidential medical information with prospective employer). While an ADA covered entity may make inquiry into the ability of an employee to perform job related functions (42 U.S.C. § 12112(d)(4)(B)), an employer cannot accomplish indirectly, through contract or other relationship, what the employer is prohibited from doing directly. 42 U.S.C. § 12112(b)(2). See also 29 C.F.R. § 1630.13(b) and 1630.14.

In the same vein, the ADA includes within its definition of "disability," having a record of a physical or mental impairment that substantially limits one or more of the major life activities of an individual. 42 U.S.C. § 12102(1)(B); 29 C.F.R. § 1630.2(g). Thus, as the Third Circuit has explained: "A person with a record of impairment can still qualify as a handicapped individual even if that individual's impairment does not presently limit one or more of that person's major life activities. Thus, for example, a person who has recovered from a history of mental or emotional illness, heart disease, or cancer may always be a handicapped individual under the statute. 45 C.F.R., pt. 84, App. A (1990)." *Nathanson v. Medical College of Pennsylvania*, 926 F. 2d 1368, 1382 (3d Cir. 1991).

As Respondents stated, one element of a claim under "prong 2" (history of impairment) of the ADA is employer knowledge. It therefore defies credibility that an employer would purposefully seek to learn about an employee's history of mental or emotional illness, heart disease, cancer or a myriad of other qualifying illnesses or injuries where the employee's current job performance was not an issue. Should these employees be disciplined or terminated in the future, they would have at least an open question as to whether their history of impairment was a motivating factor in the adverse action, an avenue made possible solely by the employer's inquiry.

B. Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII") bars discrimination because of race, color, religion, sex or national origin. 42 U.S.C. §§ 2000e-2. While some of the protected classifications such as race or a person's sex are often obvious, employers often will not know (or care) about religion, national origin or various items included within "sex" such as pregnancy, childbirth or related medical conditions and women affected by pregnancy, childbirth or related medical conditions." 42 U.S.C. § 2000e(k). As with other information unrelated to job performance, a private sector employer would have no reason to investigate and therefore learn of the protected classification characteristics of its employees

because such knowledge does nothing to advance business interests but may provide the employer knowledge necessary to establish culpability for a Title VII violation.

C. The Fair Credit Reporting Act

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* pertains to all forms of background screening. The definition of a "consumer report" includes "any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or model of living which is used or expected to be used or collected in whole or in part for ... employment purposes."

The term "employment purposes" means a report used for the purposes of evaluating a consumer for employment, promotion, reassignment or retention as an employee. As *amici curiae* Consumer Data Industry Association, *et al.* state in their brief in support of Petitioners, "when a hardware store, housing authority, fire department, or other entity retain *amici* to ask questions like those listed above (pp. 7-8) for employment and housing purposes, that activity constitutes preparation of an investigative consumer report regulated by ....FRCA." *Id.* p. 9. Thus private employers may use others to do background investigations of employees in certain circumstances subject to strict controls.

FRCA requires that employees be notified of the third party investigation including a clear and conspicuous disclosure before the report is procured and that the employee authorize in writing the obtaining of the report. Further, before any adverse action can be taken against the employee, the employer must provide a copy of the report to the employee. Penalties for non-compliance include actual damages, punitive damages, costs and attorney's fees. Criminal penalties may also apply.

D. State Law

State anti-discrimination statutes also pose significant limitations on investigation of employees. For example, the California Fair Employment and Housing Act, California Government Code § 12940(f), makes it unlawful for an employer or employment agency "to make any inquiry whether an employee has a mental disability, physical disability or medical condition" or regarding the nature or severity of a physical disability, mental disability or medical condition unless it can show the inquiry is job-related and consistent with business necessity.

E. Tort Liability

Employees who intrude upon the seclusion of employees face common law tort liability for invasion of privacy. The elements of the tort are

intrusion, physical or otherwise, into a private place, matter or conversation in a manner highly offensive to a reasonable person. Restatement (Second) of Torts § 652B. See e.g. *Acuff v. IBP, Inc.*, 777 F. Supp. 2d 914, 921 (C. D. Ill. 1999) (allowing claims for intrusion upon seclusion based on employer videotaping of employees). The tort does not require anything be done with the gained information. The violation occurs by the intrusive act. Rest. 2d § 652B.

V. THE GOVERNMENT'S CITED EXPERT AUTHORITIES DO NOT SUPPORT OPEN-ENDED QUESTIONS NOT TETHERED TO LAWFUL INQUIRY

The fundamental problem with the Form 42 questions is not that they are open-ended but that they are not carefully drawn to elicit information pertaining to the government's legitimate interests. The sources relied upon by the Government as support for its untethered or loosely tethered questions stress the importance of valid job related questions while avoiding questioning that might lead into areas protected from disclosure. In that respect it is important to note that Form 42 and the follow-up interviews are likely to elicit not only information which the employee has voluntarily disclosed to third parties but also information known or observed by the third parties even though not disclosed by the candidate. Petitioners'

argument that "the fact that an individual has already disclosed certain information to the third parties surely must diminish any privacy interest in that information" lacks merit since the Government seeks both disclosed and undisclosed information.

In any event, Petitioners' sources advise against sweeping questioning like Form 42. Dickinson, *supra*, urges open-ended questions in the context of verifying information received from the applicant and answering lingering questions that were not sufficiently explained by the applicant. "Many of the questions are likely to be the same things you asked the applicant." *Id.* p. 66. Personal references should be asked to comment on "specific job-related issues" and "[i]nquiries still should be confined to matters related to the job." *Id.* p. 68.

Muller, *supra*, employs a double standard: one set of questions for employers to respond to and a different set for potential employers to ask. Compare "When Answering Inquiries" with "When Making Inquiries." *Id.* at 204-205. Also medically related information sought by the employer must be job-related and have been consented to in writing by the employee. *Id.* 209.

Barada, *supra*, suggests a variety of open-ended questions which bear directly on job performance and job-related issues. *Id.* pp. 50-52. He then discusses "What Not To Ask!" and

observes that "all the questions outlined previously relate specifically to job performance." In the same section where the author urges use of open-ended questions, he also clarifies that reference checkers should "[c]onfine all questions to job performance" and "[n]ever ask questions about personal matters in the protected categories we outlined (age, race, sex, religion, national origin, medical, marital status or sexual orientation)." *Id.* 57. Barada also has different advice for employers giving references for past employees than employers asking for references. "If a departing candidate does not want to sign the waiver allowing your employees to speak to a prospective employer, for whatever reason, then just go back to your no-comment policy regarding that employee." *Id.* p. 86.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL.,
Petitioners,

v.

ROBERT M. NELSON, ET AL.,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CONSUMER DATA INDUSTRY ASSOCIATION, THE NATIONAL ASSOCIATION OF PROFESSIONAL BACKGROUND SCREENERS, REED ELSEVIER INC., AND THE NATIONAL ASSOCIATION OF SCREENING AGENCIES IN SUPPORT OF PETITIONERS

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191

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI 1

SUMMARY OF ARGUMENT 3

I. OPEN-ENDED QUESTIONS ARE ROUTINELY USED IN EMPLOYMENT AND TENANT SCREENING 4

A. Barring the Asking of Open-Ended Questions Deprives Employers and Landlords of Necessary Information 5

II. BOTH PRIVATE AND PUBLIC SECTOR BACKGROUND SCREENING OCCURS AGAINST A BACKDROP OF LEGISLATION THAT SAFEGUARDS PERSONAL PRIVACY 8

III. AFFIRMANCE OF THE NINTH CIRCUIT RULING WILL SERIOUSLY DISRUPT THE FUNCTIONING OF STATE AND LOCAL GOVERNMENTS 12

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Connick v. Myers, 461 U.S. 138 (1983) 12

Engquist v. Or. Dep't of Agric.,
128 S. Ct. 2146 (2008) 6, 12, 13

Ex parte Curtis, 106 U.S. 371 (1982) 12

HUD v. Rucker, 535 U.S. 125 (2002) 12

Nelson v. NASA, 530 F.3d 865 (9th Cir. 2008) 4, 5

Federal Statutes and Regulations

5 U.S.C. § 552a 10, 11

15 U.S.C. § 1681 9

15 U.S.C. § 1681a 9, 10, 11

15 U.S.C. § 1681b 10

15 U.S.C. § 1681c 10

15 U.S.C. § 1681d 10

15 U.S.C. § 1681e 10

15 U.S.C. § 1681i 10

15 U.S.C. § 1681m 10

42 U.S.C. § 290dd-2 10

42 U.S.C. § 1437d 10

24 C.F.R. § 5.851 13

State Statutes

Cal. Civil Code § 1798 13

Col. Rev. Stat. § 24-37.5-701 13
Fla. Stat. § 110.1127 13
Ind. Code § 4-1-6-2 13
Mass. Gen. Laws § 66A 13
Minn. Stat. § 13.04.05 13
N.Y. Pub. O. Law § 94 13
Ohio Rev. Code Ann. § 1347.05 13

INTEREST OF THE AMICI*

Amici are companies that engage in background screening and associations that represent the interests of such companies. *Amici* companies offer background screening services to private employers and public entities, including fire departments, public housing authorities, and administrative agencies. Their screening services often involve the use of open-ended questions similar to those that the Ninth Circuit found to be constitutionally questionable in this case.

The Consumer Data Industry Association ("CDIA") is an international trade association that represents more than 200 companies that engage in background screening on behalf of public and private clients, for purposes such as prevention of fraud, assessment of credit risk, evaluation of prospective employees and tenants, locating witnesses and non-custodial parents, and apprehension of fugitives. Its members also conduct investigations on behalf of public and private employers.

The National Association of Professional Background Screeners ("NAPBS") represents over 600 pre-employment background screening firms across the United States. Its members provide pre-

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* *Amici* file this brief with the written consent of all of the parties, which has been lodged with the clerk of this Court. No counsel for a party authored this brief in whole or in part, and only those entities listed on the cover have contributed financially to its preparation.

employment background screening information to public and private entities, who use that information to decide whether or not to extend job offers to prospective employees, or to rent apartments to prospective tenants. NAPBS clients are among the more than 88% of U.S. companies that perform background checks on their employees.

Reed Elsevier Inc. is a publisher of information products and services for the business, professional and academic communities. Its LexisNexis business unit conducts background investigations on behalf of private and public employers.

The National Association of Screening Agencies is a not-for-profit association. Its members screen both tenants and employees for tens of thousands of landlords who provide rental housing to hundreds of thousands of residents. A significant percentage of the landlords and rental units served are administered under HUD and/or state public housing authorities, with specific legal screening requirements. Both the safety and affordability of the rental units they provide depends on being able to discover all relevant risk factors in the screening process, and they ask open-ended questions to do so.

SUMMARY OF ARGUMENT

Amici are entities that screen prospective employees and tenants for both public and private clients. As part of that process, they ask open-ended questions. The Ninth Circuit, however, preliminarily enjoined the asking of such questions assuming that merely asking them is likely to cause constitutional harm. The Ninth Circuit was wrong.

First, in *amici*'s experience, the asking of such questions is a routine and necessary part of a reasonably prudent application process. *Amici* regularly pose open-ended questions similar to those condemned by the appellate court when they conduct employment and tenant screenings on behalf of government and private entities. The Ninth Circuit's denunciation of open-ended questions would deprive employers and landlords of important information as they strive to make intelligent and informed employment and tenant-related decisions.

Second, the act of posing open-ended questions to prospective employees and tenants causes no harm. Such harm would flow from the misuse of the information garnered from such questions. The record is devoid of any such misuse and federal laws—particularly the Privacy Act and Fair Credit Report Act—exist to prohibit the retention of irrelevant information and proscribe the unauthorized use of relevant information.

Third, the Ninth Circuit's ruling could well disrupt the functioning of state, local and municipal governments that routinely run employment and tenant screenings. Affirmance could well result in a

flood of litigation against state and local governments by those claiming that they were impermissibly denied housing or employment because the government obtained adverse information through questions that were "too open-ended."

I. OPEN-ENDED QUESTIONS ARE ROUTINELY USED IN EMPLOYMENT AND TENANT SCREENING

Amici and/or their members are organizations that conduct background screening for government and private entities, or supply information for such screening. Their clients include state and local government entities, such as public housing authorities, fire and police departments, and administrative agencies. The background screenings in which *amici* are involved include open-ended questions similar to those contained in Form 42.

The Ninth Circuit incorrectly held that the plaintiffs in this case were likely to prevail on their claim that the government violated the constitution by engaging in the "vague solicitation of derogatory information" through asking open-ended questions. *See Nelson v. NASA*, 530 F.3d 865, 880-881 (9th Cir. 2008). It found that such questions are not "narrowly tailored" to any legitimate state interest, *id.* at 881, and therefore are unconstitutional. The Ninth Circuit seems to have assumed that merely asking the question causes constitutional harm.

That assumption is wrong. First, in *amici*'s experience, open-ended inquiries and requests of this

type are routine and necessary parts of employment and tenant screening. Second, with respect to either type of information, the only harm that could possibly come to the plaintiffs would occur if the information was misused, and there is no evidence in this case that any such harm has or is likely to occur. The plaintiffs are protected by federal laws that prohibit the retention of irrelevant information and proscribe the unauthorized use of relevant information. No constitutional violation can possibly have occurred in this circumstance.

A. Barring the Asking of Open-Ended Questions Deprives Employers and Landlords of Necessary Information

Private and public entities employ *amici* to investigate prospective employees, volunteers and tenants and *amici* will ask open-ended questions regarding a particular job applicant, volunteer, or prospective tenant. *Amici*'s customers will provide them with a script consisting of questions that they want answered, and *amici* will then contact relevant sources of information such as prior landlords, employers, and references, and attempt to gather the requested information.

There are good reasons for permitting open-ended questions that the Ninth Circuit did not appear to factor into its decision. In its opinion, the appellate court appeared to focus entirely on the government's interest in security. *See NASA*, 530 F.3d at 881 (noting that low risk personnel pose a low threat to NASA). Although we agree with the government that security interests are certainly

present in this case (see Pet. Br. at 37), the Ninth Circuit ignored the broader interests that the government has when it acts as an employer. As this Court has recognized, the decision to hire an employee contains many intrinsically subjective decisions. *See Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2157 (2008) (acknowledging that the government has broad managerial discretion in making personnel decisions). The appellate court's conclusion that the constitution compels the government to ask only narrowly tailored questions requires the government to know specifically what information it is looking for when screening an applicant. Given the number of considerations that a hiring decision entails, that level of omniscience is unattainable.

The entire point of the open-ended question is to discover that information which the employer would not be likely to discover through targeted inquiries. For example, a reference may have formed high opinions of the applicant due to volunteer work, similar off-the-job interests, and other interactions that would never appear on a person's *curriculum vitae*. In addition, even if *amici* could ask every conceivable "narrowly tailored" question, there would be no one on the other end of the phone to respond. Sources of information typically have limited time to answer questions from potential employers or future landlords. Requiring each and every question to be "narrowly tailored," as the Ninth Circuit has, to these legitimate subjective interests would render these interviews an impossible task.

Amici therefore routinely ask open-ended questions that might give information about a candidate's suitability. The following list contains questions that were both actually asked in the course of *amici's* background screening investigations, and are representative of the kinds of questions that *amici* are asked to pursue in the context of background investigations that they conduct:

- "Is there anything you would want a prospective employer or landlord to know about this applicant?"
- "What distinguishes this applicant from other employees you worked with?"
- "Describe the applicant's character."
- "Do you consider this person to be trustworthy? If no, explain."
- "Do you have any reason to question this person's honesty or trustworthiness?"
- "Do you have any adverse information about this person's Employment, Residence or Activities concerning Violations of the Law?"
- "Do you have any adverse information about this person's Employment, Residence or Activities concerning Other matters? Explain."

- "Do you know if [sic] any other conduct relating to an assessment of potential untrustworthiness and/or unreliability? If yes, explain."

- "Describe applicant's reputation."

When such questions are asked by employers and landlords, the people answering them do not see them as reflecting the existence of any individualized suspicion about the subject of a screening investigation. The fact that an employer asks about drug use, inappropriate behavior, or "anything else" does not mean that it believes the applicant has any such problems. The exercise of an ordinary employer's prudence by the government in asking these open-ended questions causes no constitutional harm.

II. BOTH PRIVATE AND PUBLIC SECTOR BACKGROUND SCREENING OCCURS AGAINST A BACKDROP OF LEGISLATION THAT SAFEGUARDS PERSONAL PRIVACY

The Ninth Circuit's concern about the asking of open-ended questions appears to flow from the fear that the information obtained will be misused. The mere potential that the government might misuse some of this information is not a reason to bar the asking of the question as a matter of constitutional law. The fact that petitioner might use these answers to make a bad employment or tenant decision might raise constitutional questions if it were going to use them to engage in

discrimination against a protected class, for example, or to disseminate it for an impermissible purpose or in violation of some statutory obligation. Here, however, there is no evidence of any such misuse either having occurred or being likely to occur in the future. In view of the usefulness of these inquiries, therefore, the danger of misuse should be addressed not by prohibiting the government from gathering the information, but by restricting its unauthorized use. That is precisely what Congress has done.

Both private and public background screening commonly occur against a backdrop of legislation designed to protect personal privacy. When a hardware store, housing authority, fire department, or other entity retains *amici* to ask questions like those listed above for employment and housing purposes, that activity constitutes preparation of an "investigative consumer report," regulated by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*[1] The FCRA permits private employers to

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[1] More specifically, the FCRA regulates the activities of "consumer reporting agencies" which it defines as "any person which, for monetary fees, . . . regularly engages in whole or in part in the practice of assembling or evaluating . . . information on consumers for the purpose of furnishing consumer reports to third parties." 15 U.S.C. § 1681a(e). "Consumer reports," in turn, are defined as "any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness . . . character, general reputation, personal characteristics or mode of living which is to be used or collected in whole or in part for . . . employment purposes." 15 U.S.C. § 1681a (d)(1)(B). An "investigative

employ others to investigate potential hires, while at the same time implementing quality control standards over the use of the data, limiting the purpose and scope of the disclosure, and providing rights to challenge and correct the information.[2] The government, in addition to being subject to the FCRA in many cases, is also limited by the Privacy Act, 5 U.S.C. § 552a, and other statutes.[3]

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consumer report" constitutes "information on a consumer's character, general reputation, personal characteristics, or mode of living... *obtained through personal interviews* with neighbors, friends or associates... or others . . . who may have knowledge concerning any such items of information." 15 U.S.C. § 1681a (e) (emphasis supplied).

[2] *See, e.g.*, 15 U.S.C. §§ 1681(a)(3)(B), 1681b(f) (barring employers from commissioning investigations except for permitted purposes); id. §§ 1681d, 1681b(b)(1)-(2) (requiring an employer who plans to gather information via interview (e.g. compile an investigative consumer report) not only obtain the applicant's written consent to its preparation, but also specifically inform him that his character will be investigated); *id.* §§ 1681d(b)(4) (requiring information obtained through personal interviews to be verified or be the best source of information); *id.* § 1681m (requiring non-public record information to be re-verified after a certain time frame if re-used); *id.* §§ 1681i, 1681c(f) (providing rights to consumers in the event of disputed information); *id.* § 1681e(b) (requiring procedures to ensure "maximum possible accuracy").

[3] The FCRA does not apply to consumer reports generated for a national security investigation. 15 U.S.C. § 1681b(b)(4). Other statutes limiting the use of the kind of information gathered in this case include 42 U.S.C. § 1437d(t); 42 U.S.C. § 290dd-2 (prohibiting use of drug treatment records in criminal proceedings and the dissemination of such records).

The Privacy Act operates as a rough analog containing its own quality, disclosure, and enforcement provisions. Unauthorized disclosures of information are punishable by civil and, in egregious cases, criminal liability.[4] The government must also discard information that is irrelevant to the government's decision. *See* 5 U.S.C. § 552a(e)(1). *See also id.* § 552a(e)(5) (requiring maintenance of records in a way that ensures accuracy, relevance, and fairness to the individual). If the subject of a report believes that the government has inaccurate information about her, she may challenge the accuracy of that information and, if inaccurate, have it removed from her file. *See* 5 U.S.C. §§ 552a (d)(3), (g)(1) (permitting civil cause of action to amend record).

The Ninth Circuit's ruling creates the anomalous situation where *amici* may, under the FCRA, lawfully collect potentially relevant information relating to "character, general reputation, or mode of living," 15 U.S.C. § 1681a(e), on behalf of private entities, and have the government *constitutionally* be prohibited from doing the exact same thing. That result makes little sense, particularly when (a) the unauthorized use and disclosure of that information is guarded by a statute that protects the individual from unfair uses of the information, and (b) the legitimate interests of

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[4] *See* 5 U.S.C. § 552a(g), (i) (providing civil and criminal penalties for willful disclosure of covered information to those not authorized to receive it).

the government in having an efficient and suitable workforce are the same as—if not greater than—those of private employers and landlords that lawfully and routinely seek out such information through the screening process.

III. AFFIRMANCE OF THE NINTH CIRCUIT RULING WILL SERIOUSLY DISRUPT THE FUNCTIONING OF STATE AND LOCAL GOVERNMENTS

The panel's holding has implications well beyond the four corners of this case. Affirming the lower court's decision could "jeopardize the delicate balance governments have struck between the rights of public employees and "the government's legitimate purpose in 'promot[ing] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service.'" *Engquist*, 128 S. Ct. at 2156, (citing *Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (quoting *Ex parte Curtis*, 106 U.S. 371, 373 (1982)); *see also HUD v. Rucker*, 535 U.S. 125, 134-35 (2002) (rejecting the argument that the government in its capacity as a landlord effecting a no-fault eviction violates the Due Process Clause).

State, local, and municipal governments routinely run background screens on employees and tenants, subject, like the federal government, to laws that regulate the dissemination of personal information acquired in that screening to varying

degrees.[5] That screening also routinely occurs in the context of public housing projects at the federal level.[6] The creation of a privacy right in the absence of any showing of harm from unauthorized disclosure would result in a flood of disruptive litigation against state and local governments by those claiming that they were impermissibly denied housing or employment because the government obtained adverse information through questions that were "too open-ended." Such a result eviscerates this Court's "common-sense" notion "that government offices could not function if every employment decision became a constitutional matter." *Engquist*, 128 S. Ct. at 2156 (citation omitted).

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[5] *See, e.g.*, Mass. Gen. Laws § 66A(1), (2) (placing limits on use of information); Cal. Civil Code § 1798 *et seq.*; Minn. Stat. §§ 13.04-05 (same); N.Y. Pub. O. Law § 94 (same); Ohio Rev. Code Ann. § 1347.05 (mandating that state agencies take "reasonable precautions" to "protect personal information"); Ind. Code § 4-1-6-2 (same); Minn. Stat. §§ 13.04-.05 (same); N.Y. Pub. O. Law § 94; Ohio Rev. Code Ann. § 1347.05 (mandating "reasonable precautions" be taken to "protect personal information"); Fla. Stat. § 110.1127(d) 2 (listing the use of information obtained to screen potential public employees for any other purpose as a misdemeanor); Col. Rev. Stat. § 24-37.5-701 to 707 (mandating the creation of "interdepartmental data protocols" to protect personal information from release to, or use by, unauthorized persons).

[6] *Cf.* 24 C.F.R. § 5.851 *et seq.* (describing permissible considerations when determining admissibility into federally assisted housing).

CONCLUSION

The judgment of the court of appeals should be REVERSED.

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May 27th, 2010

AMICUS CURIAE BRIEF

No. 09-530

IN THE

Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, *et al.*,

Petitioners,

v.

ROBERT M. NELSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Statement of Interest 1

Introduction and Summary of The Argument 3

ARGUMENT 5

I. THE COURT BELOW CORRECTLY RECOGNIZED THE PLAINLY SERIOUS CONSTITUTIONAL QUESTIONS RAISED BY THIS WHOLLY UNJUSTIFIED INCURSION ON PERSONAL PRIVACY 5

A. Plaintiffs Have A Strong, Deeply-Rooted Privacy Interest In Resisting The Federal Government's Demand For Details of Their Counseling and Treatment 5

B. The Compelled Revelation of Treatment Is Completely Without Justification 15

C. The Government's Actions Contravene Important Public Interests 20

D. The Specific Context Here Heightens Rather Than Mitigates Privacy Concerns 22

II. THE BROAD POWERS CLAIMED BY THE GOVERNMENT ARE OBVIOUSLY PROBLEMATIC 25

A. The Government Offers No Valid or Logical Explanation for This Information Demand 26

B. The Extension of Power Sought Is Not Routine or Unexceptional 34

Conclusion 38

TABLE OF AUTHORITIES

Begay v. *United States*, 553 U.S. 137 (2008) 34

Board of County Comm'rs v. *Umbehr*, 518 U.S. 668 (1996) .....

Boyd v. *United States*, 116 U.S. 616 (1886) 36

Bragdon v. *Abbott*, 524 U.S. 624 (1998) 11

Brogan v. *United States*, 522 U.S. 398 (1998)..... 19

California Div. Labor Standards Enforcement v. *Dillingham Const., N.A., Inc.*, 519 U.S. 316 (1997) 5

Chandler v. *Miller*, 520 U.S. 305 (1997) .....*passim*

Correctional Services Corp. v. *Malesko*, 534 U.S. 61, 66 (2001);

Chrysler Corp. v. *United States*, 316 U.S. 556 (1942) 21

Clark v. *Virginia Bd. Bar Examiners*, 880 F. Supp. 430 (E.D. Va. 1995) 18, 19, 32

Conant v. *Walters*, 309 F.3d 629 (9th Cir. 2002) 24, 33

Cruzan v. *Director, Missouri Department of Health*, 497 U.S. 261 (1990)..... 8

Engquist v. *Oregon Dep't Agric.*,
128 S. Ct. 2146 (2008) 34

EEOC v. *J.B. Hunt Transp. Co.*,
128 F. Supp.2d 117 (N.D.N.Y. 2001) 32

Ferguson v. *City of Charleston*,
532 U.S. 67 (2001) 9, 21

Florida v. *Bostick*, 501 U.S. 429 (1991) 37

Garrity v. *New Jersey*, 385 U.S. 494 (1967) 19

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 37

Gonzales v. *O Centro*, 546 U.S. 418 (2006) 28, 33

Gonzales v. *Raich*, 545 U.S. 1 (2005) 33, 34

Greenawalt v. *Indiana Dept. of Corrections*,
397 F.3d 587 (7th Cir. 2005) 36

Griswold v. *Connecticut*, 381 U.S. 479 (1965) 10

Jaffee v. *Redmond*, 518 U.S. 1 (1996) 9, 23

Kimbrough v. *United States*, 552 U.S. 85 (2007) ... 33

Lefkowitz v. *Turley*, 414 U.S. 70 (1973) 36, 37

Linder v. *United States*, 268 U.S. 5 (1925) 8, 11

Loder v. *City of Glendale*,
927 P.2d 1200(Cal. 1997) 29

Mangels v. *Pena*, 789 F.2d 836 (10th Cir. 1986) ... 7, 9

MX Group, Inc. v. *City of Covington*,
293 F.3d 326 (6th Cir. 2002) 13

Nixon v. *GSA*, 433 U.S. 425 (1977) 22

NAACP v. *Alabama ex rel Patterson*,
357 U.S. 449 (1958) 25

Nassau School Bd. v. *Arline* 480 U.S. 273 (1987) ... 12

National Fed'n Fed. Employees v. *Greenberg*,
983 F.2d 286 (D.C. Cir. 1993) 20, 33

NORML v. *Bell*, 488 F. Supp. 123 (D.D.C. 1980) 33

NTEU v. *U.S. Dept. Treas.*,
25 F.3d 237 (5th Cir. 1994) 7

NTEU v. *Von Raab*,
489 U.S. 656 (1989) .....*passim*

Olmstead v. *United States*, 277 U.S. 438 (1928)..... 13

Ricci v. *DeStafano*, 129 S. Ct. 2658 (2009) 16

Richardson v. *McKnight*, 521 U.S. 399 (1997) 36

Riggins v. *Nevada*, 504 U.S. 107 (1992) 8

Robinson v. *California*, 370 U.S. 660 (1962)..... 8, 11

Ross v. *Ragingwire Telecommunications, Inc.*,
174 P. 3d 200 (Cal. 2008) 32

SEC v. *Chenery Corp.*, 318 U.S. 80 (1943) 28

Skinner v. *Railway Labor Executives' Ass'n*,
489 U.S. 602 (1989) ..... *passim*

Tehan v. *United States*, 382 U.S. 406 (1966) 10

United Paperworkers Int'l Union v. *Misco, Inc.*,
484 U.S. 29 (1987) 29

United States v. *Borough of Audubon*,
797 F. Supp. 353 (D.N.J. 1991),
aff'd 968 F.2d 14 (3d Cir. 1992) 13

United States v. *OCBC*, 532 U.S. 483 (2001) 24

United States v. *Southern Mgm't*,
955 F.2d 914 (4th Cir. 1992) 11

U.S. Chamber of Commerce v. Reich,
74 F.3d 1322 (D.C. Cir. 1996) 36

U.S. Dep't of Justice v. *Reporters Committee
for Freedom of Press*,
489 U.S. 749 (1989) 6, 9

Whalen v. *Roe*, 429 U.S. 589 (1977)..... 6, 18, 19, 20

Statutes, Laws, and Legislative Materials

Pub. L. 93-579 § 2(a)..... 23

5 U.S.C. 552(b)(6) 26

5 U.S.C. § 552a(b)(2)..... 23

5 U.S.C. § 552a(e)(1) 26

5 U.S.C. § 7352 31

18 U.S.C. § 1001 19

41 U.S.C. §§ 702(a)(1)(E) 29

42 U.S.C. § 290dd 13

42 U.S.C. § 290dd(b)(1) 16

42 U.S.C. § 2473c 29

42 U.S.C. § 2473c(e)(1) 32

42 U.S.C. § 12112(d)(4) 16

H.R. Rep. No. 91-1663 (1970) 12

H.R. Conf. Rep. No. 92-920 (1972) 13

H.R. Rep. No. 100-711 (1988) 11

Regulations and Administrative Materials

24 C.F.R. § 100.201(a)(2) 11

28 C.F.R. § 35.104(1)(ii) 11

Homeland Security Presidential Directive 12 (August 27, 2004) 27

USDOJ Technical Assistance Manual (1993) 11

Other Materials

Allen, *Lying to Protect Privacy*,
44 Vill. L. Rev. 161, (1999) 16

S. Chou, *et al.*, Twelve-Month Prevalence, and Changes in Driving After Drinking United States, 29 Alcohol Res. & Health, 143 (2006) 34

Fields, "White House Czar Calls for End to 'War on Drugs,'" Wall Street Journal A3 (May 14, 2009) 14

Charles Fried, *Privacy*,
77 Yale L. J. 475 (1968) 10, 37

Institute of Medicine, Dispelling The Myths About Addiction (1997) 11, 12

Institute of Medicine, Marijuana and Medicine: Assessing the Science (1999) 33

C. O'Brien & A. McLellan,
"Myths about the Treatment of Addiction,"
347 The Lancet 237 (1996) 12

Physician Leadership on National Drug Policy, Position Statement (1997) 12

Principles of Addiction Medicine (A. Graham & T. Schultz, eds. 2000) 6

A. Solzhenitsyn, Cancer Ward (1969) 2

Statement of Interest*

The Drug Policy Alliance (DPA) seeks to advance reasoned discussion of laws and policies relating to the use and misuse of drugs and other potentially harmful substances and identify and promote policy approaches that are consistent with medical, scientific, and public health realities; and with American values and principles.

Through its Office of Legal Affairs, DPA has submitted amicus briefs in numerous cases in this Court and others. Many of these have sought to cast greater light on the tangible, dignitary, and civic damage caused by drug policies that rely on criminal punishment and the special tendency of inappropriate "war" rhetoric to produce heedless action and extravagant claims of authority and demands for deference. DPA has sought in other cases to call attention to unintended ways in which the government's law enforcement actions work at cross-purposes with its public health responsibilities, specifically with efforts to help Americans struggling with problems of addiction and chemical dependency. To its credit, the federal government has been at the fore in recognizing alcohol and drug addiction as a serious, treatable health condition, counteracting fears and stereotypes, protecting the civil rights of people struggling with addiction, and improving the accessibility and efficacy of treatment.

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* Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than *amicus* or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

This case is in some ways different from those just described, but it implicates the same core DPA concerns. Unlike cases arising from excessive prosecutorial zeal or from tensions arguably inherent in the government's dual law enforcement and public health responsibilities, the action here involves a direct incursion on the privacy rights of individuals who have sought counseling or treatment for substance abuse problems: plaintiffs were initially told by the government that details of confidential treatment were required to determine their continued "suitability" and provided with a chart identifying "addiction" and substance abuse treatment as especially grave "issues," apparently on par with arson and child molestation.

Although the government now largely disavows that chart, it advances legal arguments that are hardly less troubling. A central strand in its attack on the decision below is that the privacy interests of Americans who seek care and treatment for substance abuse problems are undeserving of the respect accorded those with health conditions "unrelated to unlawful conduct." Such casual assertions break faith with decades of federal law and policy in this area and the important public health and human dignity interests they reflect.

Other aspects of this case are troubling in more familiar ways: as part of its effort to divert attention from the drug treatment question, the government casually claims a novel, broad power based on the bare fact that use of certain controlled substances is unlawful (even as it disavows any law enforcement interest and does not claim to be responding to any actual drug use problem).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It takes no especially close scrutiny to perceive the striking oddity of the government action from which respondents sought relief below – or its affront to personal privacy. Post-September 11 concerns that terrorists might use fraudulent identification to gain access to vulnerable facilities devolved into a requirement that long-serving privately-employed individuals, who do not occupy safety- or security-sensitive positions and have no drug interdiction or law enforcement role – provide "detailed" accounts, to be maintained as federal government records, about counseling and treatment they have received in connection with a single health condition, chemical dependency, and a single category of disapproved conduct (involving "illegal drug use"). Refusal to fully disclose this personal information leads to summary dismissal, and failure to answer honestly exposes them to federal felony prosecution.

Although petitioners repeatedly ask the Court not to "second-guess" the "judgment" their actions embody, the point of this compulsory disclosure regime is, to say the least, entirely obscure. Although the government now urges that its demand for treatment experience should be understood as benign, information NASA supplied employees classified "addiction" and "medical treatment" for chemical dependency as the gravest possible "suitability" issues, on par, seemingly, with kidnapping, murder, and illegal manufacture of explosives – and more serious than possession of explosives, vehicular homicide, or harboring a fugitive. J.A. 98-104.

Rather than undertake to explain why its information demands are legitimate or necessary, the government instead asks the Court to overturn the decision below by recognizing a plenary power, derived from the fact that certain substances are "illegal," such that those who use them – and those who receive counseling or treatment for dependence on them – have no privacy interests it is bound to respect.

That effort fails in every way. This Court's privacy precedents do not provide a shred of support for the "waiver-by-drug-use theory," let alone a "waiver-by-addiction" or "by-treatment" one, and treatment has long been provided specific federal law protection, reflecting recognition that, contrary to the government's arguments, treatment matters are almost uniquely "sensitive" and that respecting their privacy is imperative to public interests of "transcendent importance." Arguably worse, the government's effort to find fault with the decision below entails casual assertions, that individuals seek counseling "for illegal use" relevant to "character," with scant awareness of their incompatibility with principles that have informed substance abuse policy of all three branches for decades.

Nor can the government's actions be buttressed by placing them in the "context" of its singular demand for details about activities involving "illegal drugs." Even the proverbial "curbstone philosopher," attuned to recognizing that "everything is related to everything else," *California Div. Labor Standards Enforcement* v. *Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring), would have difficulty connecting off-duty drug use by long-serving JPL employees to the identity fraud and

terrorism that led to the imposition of this new mandate, and it is unclear how a person's negative answer to this (or any) single-subject question could, as the government claims, "ensure[his] trustworthiness" and "establish" his law-compliance. (Nor is it clear, in this context, that a negative answer would provide reliable information).

The asserted "need" to "uncover and address illegal drug use" looks strange in light of the government's repeated disclaimer of any "sovereign" law enforcement interest, and of telling indications that the government "as employer and proprietor" does not view off-duty use of a controlled substance by contractor employees as nearly as serious a "suitability" concern as many other activities about which is does not seek, let alone demand, disclosure. Although the present posture of this case does not require this Court to separately resolve the legality of these demands, neither should it decide the issues before it on the assumption that the powers the government invokes are necessary or unproblematic.

ARGUMENT

I. THE COURT BELOW CORRECTLY RECOGNIZED THE PLAINLY SERIOUS CONSTITUTIONAL QUESTIONS RAISED BY THIS WHOLLY UNJUSTIFIED INCURSION ON PERSONAL PRIVACY

A. Plaintiffs Have A Strong, Deeply-Rooted Privacy Interest In Resisting The Federal Government's Demand For Details Of Their Counseling And Treatment

The right of privacy at issue here consists of the right to control personal or sensitive information. *U.S. Dep't of Justice* v. *Reporters Committee for*

Freedom of Press, 489 U.S. 749 (1989); *Whalen* v. *Roe*, 429 U.S. 589 (1977).

The government here does not seriously question that individuals who have sought out treatment for problems of chemical dependency have a strong interest in keeping to themselves information relating to their condition and treatment – and not forming a federal OPM record of it. See, *e.g.*, Principles of Addiction Medicine (A. Graham, & T. Schultz, eds. 2000) (emphasizing the "very special and fundamental importance" of "maintenance of confidentiality"). The American Psychiatric Association's Partnership for Workplace Mental Health Advisory Council recently found that "[c]oncerns about *** confidentiality are among the main reasons many American workers are more hesitant to seek treatment" and that "76 percent of those polled believe[d] their work status would be damaged by seeking treatment for drug addiction."[1] Caltech employees are informed that "all contact with [the University's] counselors is strictly confidential in accordance with California Law. [Its] records *** do not become part of the employee's personnel file. No information can be released *** without the employee's written permission."). See http://www.its.caltech.edu/~sfcc/

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[1] See American Psychiatric Ass'n, Employees Report Mixed Feelings About Seeking Health Care Treatment (Jan. 25, 2010) (available at http://www.psych.org/MainMenu/Newsroom/NewsReleases/2010-News-Releases/Employees-Report-.aspx).

Rather, the government argues that this interest is not one society must recognize as legitimate. It faults the decision below for assuming that *all* information about medical treatment "implicate[s] significant privacy concerns," and, in particular, for failing to recognize that demands for information "limited to treatment for *illegal drug use*," NASA Br. at 41, do not "raise [the] same constitutional concerns" as ones involving conditions "having *no relationship to unlawful activity*," *id.* See also *id.* (quoting cases holding privacy rights are not "implicated" "because the drug laws 'put citizens on notice this realm is not a private one'" and because public employees "work[] for the very government that has declared war on substance abuse") (*Mangels* v. *Pena*, 789 F.2d 836, 839 (10th Cir. 1986) and *NTEU* v. *U.S. Dept. Treas.*, 25 F.3d 237, 243 & n.3 (5th Cir. 1994)).

Every link in this chain of reasoning is mistaken, and its premises are contrary to decades of relevant federal law and policy and to the important public health principles they reflect.

1. Before getting to its argument that the privacy interests of persons undergoing treatment for substance abuse problems (involving "illegal" drugs) are singularly undeserving of protection, the government attempts to denigrate, though not expressly deny, medical privacy interests generally, describing them as outside this Court's "already-established" list of "fundamental" matters. That suggestion is seriously mistaken, both in treating the "realms" of decisional and informational privacy as entirely coextensive, see *Whalen*, 429 U.S. at 599-600, and by ignoring the many decisions of this Court recognizing fundamental autonomy interests

in matters relating to the body and mind. See, *e.g.*, *Riggins* v. *Nevada*, 504 U.S. 107, 133-34 (1992); *Cruzan* v. *Director, Missouri Dep't Health*, 497 U.S. 261, 278 (1990); see also *Robinson* v. *California*, 370 U.S. 660, 666 (1962) ("a law which made a criminal offense of [] a disease would doubtless be universally thought" unconstitutional); *Linder* v. *United States*, 268 U.S. 5, 18, 22 (1925) (describing doctor's treatment of addicted individual as "professional conduct with which Congress never intended to interfere").

In *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the Court held that "chemical analysis of [urine] to obtain physiological data" (and not just the extraction of it) is an "invasion of the tested employee's privacy interests," precisely because of its potential to "reveal a host of *private medical facts* about an [individual], including whether he or she is epileptic, pregnant, or diabetic" – and thereby "*intrude[d] upon expectations of privacy that society has long recognized as reasonable*." *Id.* at 617 (emphasis added).

And *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), recognized a conspicuous exception to the ordinary Fourth Amendment rule (NASA Br. 53) that citizens "assume[] the risk that the other person will disclose [shared] information to the government," holding that federal courts may not compel (or hear) testimony concerning psychological counseling. Confidentiality was required, the Court held – contrary to the doubts government seeks to sew about "sensitivity" and "magnitude" – because of the "transcendent importance" of providing mental

health treatment and the "sensitivity" of that process.[2]

2. The government's effort to derive a limitation on privacy from the Controlled Substances Act and its suggestion that privacy interests in treatment are diminished – or negated – by drug laws' "put[ing] citizens on notice this realm is not a private one," *Mangels*, 789 F.2d at 839, reflects not merely a "cramped notion," *Reporters' Committee*, 489 U.S. at 763, of the rights at stake but an entirely mistaken one.

To begin, *Reporters Committee*, the case the government cites (Br. 24) as illuminating the "essence" of "privacy," held that "the privacy interest in *a rap sheet* is substantial," 489 U.S. at 771 (emphasis added), even though the protected "realm" was criminal activity (indeed a subset that "ha[d] previously disclosed to the public," *Id.* at 762). Likewise, the privilege affirmed in *Jaffee* does not depend on whether details are "unrelated to criminal activity," see 518 U.S. at 17-18 (rejecting case-by-case balancing), and the Court in *Stanley* held that privacy rights disabled the government from punishing a person for possessing materials whose unlawfulness (under obscenity statutes) was undisputed.

Chandler v. *Miller*, 520 U.S. 305 (1997), held the Fourth Amendment violated where the government "sought only information about *** the use of

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[2] A "web of federal statutory and regulatory provisions," *Reporter's Committee*, 489 U.S at 764, confirms this. See, *e.g.*, 5 U.S.C. 552(b)(6); *infra* (discussing 42 U.S.C. §§ 290dd and 12112(d)(4)).

particular drugs, and not any other information about the health of the candidate," *id.* at 312; accord *Ferguson* v. *City of Charleston*, 532 U.S. 67 (2001),[3] and this Court has described the Constitution's express, specific protection against extraction of self-*incriminating* information as "'reflect[ing] the Constitution's concern for **** the right of each individual 'to a private enclave where he may lead a private life,'" *Tehan* v. *United States*, 382 U.S. 406, 416 (1966), and "enabl[ing] the citizen to create a zone of privacy which government may not force him to surrender," *Griswold* v. *Connecticut*, 381 U.S. 479, 484 (1965). See also Charles Fried, *Privacy*, 77 Yale L. J. 475, 487-88 (1968) (identifying as "the point of the [Amendment] that a man cannot be forced to make public information about himself," so that "his sense of control over what others know of him is significantly enhanced, even if other sources of the same information exist").

This Court in *Skinner* made clear why the distinction between "legal" and "illegal" substances is not tenable, when, as here, the government does not purport to "function[] as enforcer of the laws [but] as employer," Br. 17 (quoting dissenting opinion). That "consumption of alcohol is legal in most other contexts," the Court explained, while "[t]he possession of unlawful drugs is a criminal offense that the Government may punish," is irrelevant when the policy at issue addresses the

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[3] The plaintiffs in *Chandler* did not merely seek to "work for" the government that had "declared war" on drugs; they sought positions giving them responsibility for leading "law enforcement and drug interdiction policies." See *infra*.

"separate *** wrong [of] perform[ing] certain sensitive tasks while under the influence," which was "equally dangerous" with respect to both substances. 489 U.S. at 633.

3. But there is a more basic, disturbing defect in the government's reasoning. Those who answer the government's question affirmatively and honestly have not sought "treatment *for illegal drug use*," Br. 38-39, but for what all branches of the federal government have for decades recognized to be a serious, treatable health condition. See *Linder*, 268 U.S. at 18; *Robinson*, 370 U.S. at 667 n.8; *United States* v. *Southern Mgm't*, 955 F.2d 914, 923 (4th Cir. 1992) ("Congress intended to recognize that addiction is a disease from which, through rehabilitation efforts, a person may recover, and that an individual who makes the effort to recover should not be subject to *** discrimination based on society's 'accumulated fears and prejudices' associated with drug addiction"); *Bragdon* v. *Abbott*, 524 U.S. 624, 633 (1998) ("'a disability includes such diseases and conditions as * * * drug addiction and alcoholism'") (quoting 45 CFR pt. 84, App. A, p. 334 (1997).[4]

These longstanding expressions of federal policy condemn the effort to distinguish between persons

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[4]Accord 28 C.F.R. § 35.104(1)(i)(B)(ii); U.S.D.O.J. Technical Assistance Manual § 2.5000 (1993)("The ADA protects *** those with a record of [disabling] impairment include[ing] · A person *** who has recovered from mental or emotional illness, drug addiction, alcoholism, heart disease, or cancer"); 24 C.F.R. § 100.201(a)(2) (identifying drug addiction and alcoholism as "impairment[s]" for purposes of Fair Housing Act).

undergoing treatment for addiction and other medical conditions, see H.R. Rep. No. 100-711 at 22 (1988) (describing "former drug-dependent persons" as "[j]ust like any other person with a disability, such as cancer or tuberculosis"), let alone distinctions of the sort the government (Br. 6, 9, 35) advances, involving "trustworth[iness] *** and good character."

They reflect not only that (1) addiction (like many mental health conditions) has biological and genetic dimensions, see National Academy of Sciences, Institute of Medicine, Dispelling The Myths About Addiction at 37 (1997), but especially that (2) no less than other physical and mental health conditions, chemical dependency is treatable, but that (3) like certain other widely misunderstood conditions, it is the subject of a "mythology," *Nassau School Bd.* v. *Arline*, 480 U.S. 273, 285 & n.14 (1987), engendering fears and prejudices and mistreatment of blameless individuals.[5]

The stereotypes federal law seeks to counteract relate not to the legal status of particular substances but to the condition itself: "[m]any continue to see

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[5] Many intuitive bases for distinguishing addiction from other medical conditions do not withstand scrutiny. See Physician Leadership on National Drug Policy, Position Statement 10-11 (1997) (noting that volitional and behavioral dimension does not distinguish etiology from that of many health problems, including hypertension, heart disease, and diabetes). See also O'Brien & McLellan, "Myths about the Treatment of Addiction," 347 The Lancet 237-40 (1996) (finding that most lay people and physicians dramatically underestimated efficacy of drug treatment).

addicted people as immoral, weak-willed, or having a character defect," Dispelling The Myths at 138; H.R. Rep. No. 91-1663 (1970) (describing alcoholism as "no more moral or immoral than tuberculosis or schizophrenia," and deploring "custom of treating alcoholics as sinners or criminals"); *MX Group, Inc.* v. *City of Covington,* 293 F.3d 326, 342 (6th Cir. 2002) (finding ADA violation based on "unfounded fears and stereotypes" about treatment facility's clients' "status as recovering drug addicts"); *United States* v. *Borough of Audubon,* 797 F. Supp. 353, 360-61 (D.N.J. 1991), *aff'd* 968 F.2d 14 (3d Cir. 1992).

Of paramount relevance here is the long-recognized reality that chemical dependency is *unlike* other comparably serious health conditions in the extent to which negative attitudes and fears (many of which affected individuals internalize) act to deter them from seeking needed treatment. The federal government's response has been a "national commitment to encourage all those who need it to come forward for treatment." 135 Cong. Rec. S10774 (Sen. Kennedy), and among its building blocks is a statute, enacted four decades ago, that specifically provides privacy protection for the very information the government here denigrates. Title 42 U.S.C. § 290dd-2(a) provides:

> Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department

> or agency of the United States shall *** be confidential.

Its stated rationale refutes government's ill-considered "diminished privacy" claim:

> The strictest adherence to the provisions of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.

H.R. Conf. Rep. No. 92-775 at 28 (1972).

The federal government has *not* "declared war" on individuals with chemical dependency, let alone those who seek treatment. It is not asking too much that those who "work for the very government," Br. 40 (quoting *NTEU*), that has spent decades combating misunderstanding of chemical dependency and its treatment temper their zeal for winning the passing point with a respect for these carefully considered, repeatedly codified judgments – and for the values of "privacy and human dignity," *NTEU* v. Von *Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting), they reflect. Cf. *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).[6]

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[6] See Fields, "White House Czar Calls for End to 'War on Drugs'" Wall Street Journal A3 (May 14, 2009) (quoting head of Office of National Drug Control Policy that "'[r]egardless of how you try to explain to people it's a

B. The Compelled Revelation of Treatment Is Completely Without Justification

The government's carefully-phrased assertion that its "interests in the question concerning illegal drug use, including treatment or counseling," "far out-weigh[]" the privacy harms, Br. 42, leaves entirely unclear what governmental purpose its "inclusion" of treatment information is even claimed to serve.

Most obviously, the government now largely disavows what NASA long led respondents to understand: that a JPL employee's having sought counseling or treatment for addictions involving certain drugs would be a central, likely dispositive, adverse consideration in the impending "suitability" determination. See J.A. 98-104, 235; Pet. App. 5a n.2.

The government's brief now proffers a benign justification, suggesting that an individual's participation in treatment might be viewed as mitigating adverse consequences that might otherwise attend acknowledged drug *use* – or (Br. 43) that the information demanded could enable the government to avoid Rehabilitation Act liability. But these "explanations" evidently had not occurred to petitioners in the proceedings below, and each carries the whiff of the lamp. If information relating to treatment were truly viewed as mitigating, "all along," providing it would not be compulsory. The claim of compliance with antidiscrimination law is

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'war on drugs' or a 'war on a product,' people see a war as a war on them," and that "[w]e're not at war with people in this country.").

even less plausible: had civil rights responsibilities been foremost in its thinking, NASA (and those representing it below) would have forcefully disavowed the matrix, which equated "addiction" and treatment as the most serious possible character "issues." Cf. 42 U.S.C. § 290dd(b)(1) ("No person may be denied or deprived of Federal civilian employment *** solely on the grounds of prior substance abuse").[7] Rehabilitation Act liability, moreover, presumably could be imposed only had the government taken adverse action against a JPL employee *knowing* she was within the class protected. Indeed, far from *encouraging* inquiries like this one, disability law (in part precisely because of the privacy interests implicated) is unusual among civil rights laws in expressly *limiting* employers' power to inquire about information relevant to a person's protected status. See, *e.g.*, 42 U.S.C. § 12112(d)(4); cf. *Ricci* v. *DeStafano*, 129 S. Ct. 2658 (2009).

The government's most persistent assertion, that the permissibility of the demand for treatment information should be determined in the "context" of its effort to learn drug *use* information, is not an explanation at all. We explain below that the government's basis for demanding *that* information is troublingly elusive. But if there were a need to detect and record illegal drug use by JPL employees (and form questions were an effective instrument for "uncovering" it), demanding detailed counseling and

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[7] While it is unclear whether the cited provision would protect contractor employees, such uncertainty highlights the danger of casual assertions that there are no meaningful differences between them and actual federal government employees. See *infra*.

treatment information, which is entitled to strong and distinct privacy protection, could add nothing beyond what could be learned from the "use" answers.

It no more justifies an extraction of highly sensitive personal information that it occurs "in the course" of asking a series of routine questions than it would matter that a prosecutor's argument that a jury convict a defendant because he is black or because he failed to testify occurred "in the context" of a litany that otherwise fairly summarized what the admissible evidence showed.

Requiring disclosure of treatment would, if anything, heighten reluctance to answer the "use" question honestly: acknowledging treatment would entail admitting stigmatizing "problem use" (and would also raise the specter of government investigators' seeking the person's further "consent" to a treatment provider's release of otherwise confidential records).

As just noted, if the personal information sought here *were* actually needed to fulfill some substantial government purpose, the method adopted for obtaining it would be seriously problematic. Although the government's arguments presume that "asking" for particular "needed" information in this way will reliably result in its being obtained, the soundness of that assumption is doubtful. See *Chandler*, 520 U.S. at 319 (according diminished weight to interest claimed, because means selected were "not well designed to identify [those] who violate antidrug laws"); *id.* at 315 (noting that, in *Skinner*, "employees' inability to avoid detection simply by staying drug free at a prescribed test time

significantly enhanced the deterrent effect of the program").

The impulse to equivocate and shade the truth is especially powerful when sensitive, embarrassing matters are inquired into, and is especially keen among those in the grips of addiction, who experience strong feelings of shame and often have not been honest with themselves, families, and friends. See Allen, *Lying to Protect Privacy*, 44 Vill. L. Rev. 161, 178-79 (1999); *Clark* v. *Virginia Bd. Bar Examiners*, 880 F. Supp. 430, 437 (E.D. Va. 1995) (concluding that "great discrepancy" between bar applicants' one-percent affirmative response rate to mental health treatment question and rate honest answers would yield "indicate[d] that [the question] is ineffective").

The stakes, for an established professional, of honestly acknowledging receiving treatment for a condition that is pervasively misunderstood and stigmatized and doing so on a personally identifiable document that will be maintained as a federal government record, are incomparably higher.

Not only does the potential for dishonest answers affect the reliability of the "instrument," it has obvious implications for the stated interest in "fair, impartial, and equitable treatment," NASA Br. 3 (quoting Executive Order Preamble), as well, because individuals answering honestly risk being treated worse than those similarly situated who decide to not reveal their treatment experience. Nor does the threatened heavy punishment for violating the federal false statement statute, 18 U.S.C. § 1001, eliminate this problem: while that may increase truth-telling, many otherwise reluctant to disclose

will recognize that the possibility of prosecution under these circumstances is remote.[8]

Finally, the predicament confronting a JPL employee is a good deal more stark than the one the Court found relatively unsympathetic in *Brogan*, the "exculpatory no" case. Here silence in the face of demands for the treatment information has consequences: dismissal from long-term employment. Imposing that sanction for refusal to answer an "inquiry" that seems illegitimate and invasive of privacy is surely different from imposing it for not answering questions concerning the performance of an employee's duties. See, *e.g.*, *Garrity* v. *New Jersey,* 385 U.S. 494 (1967). See *National Fed'n Fed. Employees* v. *Greenberg*, 983 F.2d 286, 295 (D.C. Cir. 1993) (Edwards, J., concurring) (questioning whether *Garrity* principle should extend to "'inquiries about an employee's drug or alcohol use' *** especially if the alleged

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[8] As the opinions in *Brogan* v. *United States*, 522 U.S. 398 (1998), observed, that statute requires that the statement be "material" and that the prosecution establish intent. Here, as a practical matter, because the form does not require the respondent to expressly indicate "no," and sets aside no separate space for the treatment answer, non-response is far less likely to be detected than would leaving a blank where, for example, the form asks for a social security number or mother's maiden name.

The consequences of detected dishonesty in *Clark* were substantial: the (many) individuals failing to disclose mental health treatment were would-be attorneys responding, under penalty of perjury, to their professional licensing authority.

conduct was off-duty and the employee has a long history of exemplary service").

This case is in relevant respects strikingly different from *Whalen*. There was no indirection there: the State of New York, responding to deficiencies identified by a study commission, 429 U.S. at 592, sought information in its "sovereign" capacity as enforcer of laws against drug diversion; the relationship of the information collection to accomplishment of this "vital interest" was self-evident. The regime did not require patients personally to provide the State sensitive information, under penalty of prosecution; nor was the government making individualized "character" decisions based on that information or adding it to a central personalized "file." Access was strictly controlled, and by law the information was destroyed after five years. *Id.* at 593.

C. The Government's Actions Contravene Important Public Interests

For reasons already canvassed, the demand for treatment information *undermines* in myriad ways the "transcendent" public interest, long championed by the federal government, in ensuring that those in need of treatment and counseling will seek and obtain it. See *Ferguson*, 532 U.S. at 84 n.23 ("*Amici* claim a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health"); *Chrysler Corp.* v. *United States*, 316 U.S. 556, 570 (1942) (Frankfurter, J., dissenting) ("The circumstance that one of the parties [to a case] is the Government does not in itself mean that the interest

which it asserts defines and comprehends the public interest which the court must vindicate.").

Plainly, for a JPL employee struggling with a substance abuse problem, the treatment question combined with the "suitability matrix" would send a number of chilling messages. It indicates in so many words that, whatever her employer might say, seeking treatment would risk termination by NASA and that acknowledging an "addiction" would be viewed, consistently with long-entrenched stereotypes, as more of a "suitability" problem than "regular use" of heroin or cocaine. J.A. 98-104. And even if she credited the government's present representation that its decisions would not be "based on" the matrix itself, she might still reasonably fear (especially given the slow and "Glomar" disavowal) that the underlying attitudes would persist.

Even if the "suitability matrix" had never surfaced, moreover, the government's *question* – by linking counseling and treatment with illegal use (as a "character issue" subject to compulsory disclosure) – would raise similar apprehensions. Indeed, the form's singular, unexplained fixation on "illegal drugs" – *alone* among possible "suitability" issues – risks reinforcing the feelings of shame that deter many chemically-dependent persons from seeking needed help.

This single-minded pursuit of treatment-related information for illegal drugs cannot be explained by considerations of paperwork reduction or administrative efficiency concerns. Government estimates establish that *alcohol* dependence and abuse – which are not inquired into – are far more common than conditions involving all other substances. See Substance Abuse & Mental Health

Services Admin., National Survey of Drug Use and Health, (2008) (finding that 15.2 million Americans are dependent on or abuse alcohol, but not drugs; 3.9 million are dependent on or abuse drugs alone; and 3.1 million are dependent on or abuse both alcohol and drugs).

Indeed, the starkly divergent approach to treatment and counseling for problems involving "illegal" substances at least reinforces and arguably reflects what treatment researchers and the government have identified as a major barrier to addressing problem use of alcohol and prescription medications: perception that their status as "legal" substances means they are relatively safe and unlikely to induce dependence.

D. The Specific Context Here Heightens Rather Than Mitigates Privacy Concerns

Even while admonishing against evaluating privacy-based claims "in the abstract," Br. 25 (quoting *Nixon* v. *GSA*, 433 U.S. 425, 458 (1977)), the government insists that the disclosure be analyzed in isolation from concerns about how the personal information might be misused, emphasizing its late-breaking representation that the disputed "matrix" will not be used in determining suitability and the safeguards built into the federal Privacy Act.

These contentions draw much too sharp a distinction between disclosure *to* and *by* the government. The cases the government cites recognize that involuntary disclosure of sensitive information to government is itself an infringement on the right to control personal information, see *Nixon* v. *GSA*, and that the government's vast ability to aggregate information and maintain records can

itself be a threat. See *Reporters' Committee*, 489 U.S. at 771 ("rap sheet" containing long-forgotten public information). That specific concern was recognized by the Congress that enacted 42 U.S.C. § 290dd, which noted "fears" about "records that will attach for life" as discouraging treatment, and in the Privacy Act's findings that "(1) the privacy of an individual is directly affected by the *collection*, maintenance, use, and dissemination of personal information by Federal agencies" and "(2) the increasing use of *** sophisticated information technology *** has greatly magnified the harm to individual privacy that can occur from any *collection* *** of personal information." Pub. L. 93-579 § 2(a) (emphasis added).[9]

To those for whom "the mere possibility of disclosure" may impede "successful treatment," *Jaffee*, 518 U.S. at 10, assurances that the government "will protect [that information] from unauthorized disclosure," is of decidedly limited value. That protection is not against "disclosures

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[9] See A. Solzhenitsyn, Cancer Ward 192 (1969):

> As every man goes through life he fills in a number of forms for the record, each containing a number of questions. A man's answer to one question on one form becomes a little thread, permanently connecting him to the local center of personnel records administration. There are thus hundreds of little threads radiating from every man, millions of threads in all, *** Each man, permanently aware of his own invisible threads, naturally develops a respect for the people who manipulate the threads *** and for these people's authority.

[un]authorized *by the individual*," but rather ones unauthorized *by the statute* – which identifies a series of "routine" circumstances in which information may and must be released, without permission or notification of the individual, including disclosures "to the general public," pursuant to FOIA. See 5 U.S.C. § 552a(b)(2). Although FOIA also gives the government power to withhold "personnel and medical" information when it determines there would be "a clearly unwarranted invasion of personal privacy," *id.* § 552(b)(6), its value as a safeguard depends on the same government that *in this case* takes so dismissive a view of the personal privacy of this information.[10]

The government is also wrong that the use to which the information might be put is "irrelevant." Although the court below found claims concerning the use of information unripe for *decision*, it does not follow that the potential abuses indicated by the matrix were (or are) irrelevant to the issues it did decide: The government interest side of the "balancing" requires determining how disclosed information will (and will not) be used, and the government's own arguments show the relevance to the "individual privacy" side. Involuntary disclosure

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[10]In this context, even assurance that truthful answers will not "be used as evidence against you in any subsequent criminal proceeding," are less than iron-clad. The government responded to California's enactment of its Compassionate Use Act by initiating *civil* enforcement proceedings under the Controlled Substances Act, see *United States* v. *OCBC*, 532 U.S. 483 (2001) and by threatening the licensure of physicians who provided the recommendations contemplated under the state law, see *Conant* v. *Walters*, 309 F.3d 629 (9th Cir. 2002).

to an entity with both the means and inclination to cause a person harm is surely a more serious violation of his informational control, see *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

II. THE BROAD POWERS CLAIMED BY THE GOVERNMENT ARE OBVIOUSLY PROBLEMATIC

We explained above the first error of the government's efforts to submerge its deeply problematic demand for drug treatment information within the "context" of its demand that respondents detail their use of illegal drugs. As the decision below properly recognized, the government could only justify its abridgment of core individual privacy by explaining what purpose its extraction of that information served (or what interest would be impaired by omitting the demand). And it has not (and cannot) not do so.

We now highlight the second important error underlying that government contention: its assumption that NASA's demand that JPL employees disclose to the federal government details of their illegal drug use is itself a "routine" or legally unproblematic one.

While it is not necessary or (given the present posture of this case) prudent for the Court to announce or enforce the limits on the government's power to demand information (on threat of termination) from privately-employed individuals about off-duty activities, neither should the Court ratify the government's vague assertions of "broad powers" and "strong interests" in this area, or decide the issues that are before it based on them.

A. The Government Has No Valid or Logical Explanation for This Information Demand

Despite pleas against "second-guessing" a judgment, and broad assurances that its "need for [the] information is substantial," petitioners again fail to identify their basis for demanding disclosure of illegal drug use (and virtually no other non-public-record information) from JPL employees. Indeed, none of the reasons suggested – either the security interests that NASA initially invoked, nor the "symbolic" one cited by the court below (in its provisional ruling on respondents' Fourth Amendment claim), nor the various "suitability" rationales in petitioners' brief – meets the standard *the government* contends should govern: that "a federal agency [] collect *** 'only such information about an individual as is *relevant and necessary* to accomplish a purpose *** *required to be accomplished* by statute or by executive order of the President.'" NASA Br. at 7 & n.4 (quoting 5 U.S.C. § 552a(e)(1) and explaining that statutory definition of "maintain" includes "collect") (emphasis added).

1. Despite references to the September 11 Commission and the Homeland Security Directive and the need to "ensure the safety and security of important federal facilities," petitioners understandably make no real effort to connect *this* information demand to the national security concerns they describe as providing the impetus for the challenged action.

On the contrary, the quoted Commission recommendation, that the federal government "develop a uniform standard for the issuance of secure identification documents" urged setting federal "standards for the issuance of *birth*

certificates and *** *driver's licenses*," September 11 Commission Report at 390 (emphasis added), explaining that at airports and similar "vulnerable facilities [such] *** sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists." *Id.* Likewise the Presidential Directive addressed "the *forms of identification*" that should be required for access to sensitive facilities, focusing on "criteria for *verifying an individual employee's identity;* and "resistan[ce] to identity fraud, tampering, counterfeiting, and terrorist exploitation." Homeland Security Presidential Directive 12, ¶ 3 (August 27, 2004) (emphasis added).

Although Question 14 appears "in the context" of others that clearly serve the purpose of ensuring "that people are who they say they are," the information about substance use (or treatment) is, to say the least, "meaningfully distinguishable," from the biographical information these others elicit. It does not help "to verify the identities and histories" nor does the government claim, or even hypothesize, that long-serving JPL employees – or the subset who "use illegal drugs" (and answer the government's question truthfully) – are likely to fraudulently obtain access to the facility for terrorist or other destructive purposes. These plaintiffs have been determined to occupy positions that pose a low security risk; they raise no objection to identity verification procedures; and the government

acknowledges, neither the drug use question nor the broad investigation was mandated by HSD12.[11]

2. The interest the court of appeals favorably cited, "preventing [the federal government's] strong stance in its war against illegal drugs from being undermined as a result of drug use by its employees and contractors," App. at 20a, is no less deficient.

That rationale is of course a long distance from the "exigent circumstances" invoked in imposing the contract term over Caltech's objections, see *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), and this Court repeatedly has been skeptical of broad "need [to] set a good example" claims, *Chandler*, 520 U.S. at 322, which "diminish[] personal privacy," for "a symbol's sake," *id.* Cf. *Gonzales* v. *O Centro*, 546 U.S. 418, 430 (2006) (rejecting government's argument that "the public will misread" [religious] exceptions as "signaling that the substance at issue is not harmful after all").

The possible effect on the "government's stance" of otherwise-undisclosed drug use by these contract employees surely pales in comparison to that of the plaintiffs in *Chandler*, would-be high State officials, who sought supervisory, though not front-line "responsibility for law enforcement" and for "Georgia's drug interdiction efforts." Compare Br.

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[11] Although the government (Br. 36) persists in asserting that "'low risk' is not 'no risk,'" it is the lowest *possible* designation, and the notion that individuals have worked for years in low-security JPL positions with the purpose of doing harm is far-fetched enough, even without reaching the next link in the reasoning chain – that such a malefactor's plans would be foiled by asking him whether he has used illegal drugs.

37-38 (asserting, elliptically, that "the very nature of [plaintiffs'] responsibilities underscores the legitimacy" of the government's intrusion here") with *Chandler*, 520 U.S. at 321 (explaining that *Von Raab*, "must be read in its unique context" of employees with "[d]rug interdiction [as their] *** primary *** mission," quoting 489 U.S. at 660).

There is no indication that Congress views off-duty drug use by contract employees in plaintiffs' position to be of even symbolic concern. Congress has twice legislated in this area: it provided for drug *testing* of those NASA contractor employees who (unlike respondents) have "responsibility for safety-sensitive, security, or national security functions," 42 U.S.C. § 2473c, and the "Drug-Free Workplace Act" prohibits contractor employees from engaging in unlawful activities involving controlled substances when at "*a site for the performance of work done in connection with a specific grant or contract.*" 41 U.S.C. §§ 702(a)(1)(E); 706. Cf. *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 44 (1987) ("public policy" would not bar reinstatement of employee who "possessed drugs on [employer] property" but could be trusted not to use them "on the job").

Indeed, the "stance" imputed might be assessed in light of NASA's evident position that arrest for marijuana possession raises a "suitability" issue seemingly on par with a "minor traffic violation," J.A. 98-104 (it is not clear that the stance would be less "undermined" if a JPL scientist answered Question 14 negatively, but continued to use a drug at home).

3. Although NASA "asserts no evidence of a drug problem among" JPL employees; and concedes that

they "typically do not perform high-risk, safety-sensitive tasks," *Chandler*, 520 U.S. at 321-322 (and "the required certification [avowedly] aids no interdiction effort," *id.*), it nonetheless posits that the compelled disclosure here is needed "to establish whether [respondents] *would be* reliable, law-abiding, and trustworthy contract employees," or engage in activities that "*would affect* *** work performance" Br. 42. See *id.* (citing an article finding "negative correlations," between drug use and "productivity"). But there is no need to resort to inferential or probabilistic reasoning: respondents already *are* (and long have been) "contract employees." Thus,

> [A]n employer generally need not resort to suspicionless drug testing to determine whether a *current employee* is likely to be absent from work or less productive or effective as a result of current drug or alcohol abuse: an employer can observe the employee at work, evaluate his or her work product and safety record, and check employment records.

Loder v. *City of Glendale*, 927 P.2d 1200, 1223 (Cal. 1997); *Von Raab*, 489 U.S. at 674 (permitting screening because, *inter* alia, it was "not feasible to subject [particular] employees and their work product to *** day-to-day scrutiny").

Respondents' *own* employer, which maintains a direct interest in their productivity and workplace safety, does not believe the government's demands are necessary or even "appropriate." Cf. *Skinner*, 489 U.S. at 607 (explaining that government requirement reinforced longstanding employer-imposed prohibition against on-duty substance use by those with safety responsibilities).

And leaving aside doubts about the reliability of "information" this mode of proceeding produces, see *supra*, the surface plausibility of the government's position is punctured by its silence as to why a "responsible employer" genuinely concerned about "ensuring trustworth[y]" or productive employees (Br. 54) would distill its screening process to a lone, single-subject question, concerning "illegal" drug activities.

To note this is not to "second-guess" NASA's views as what are especially important "suitability" considerations. As the "issue classification" document indicates, there are at least 18 federal statutes that require *automatic* debarment; the government does not seek information from JPL employees bearing on any of these, including 5 U.S.C. § 7352, which provides that "An individual who habitually uses intoxicating beverages to excess may not be employed in the competitive service." Cf. *Skinner*, 489 U.S. at 606 (stating that "[t]he problem of alcohol use on American railroads is as old as the industry itself" and noting evidence that "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year").

Indeed, without making any claim that the classification matrix is an accurate or even closely approximate depiction of NASA's suitability decisionmaking, it is nonetheless suggestive that it presents "infrequent marijuana use" as *less* serious for suitability purposes than, *inter alia*, shoplifting, abuse of property, failure to file income tax, traffic violations, illegal gambling, fraud, or DUI. And it classifies "*regular use*" as less serious than sexual harassment, income tax evasion, receiving stolen

property, carrying a concealed weapon, or violating the Hatch Act.

Thus, while the government proffers a significant-sounding interest (as "employer and proprietor") in "[u]ncovering and addressing unlawful drug use," Br. 39 (quoting decision below), it makes no similar effort to learn about other unlawful activities it views as more serious, and it is doubtful the government would "address" whatever drug activity answers may uncover by taking adverse action. See *Clark*, 880 F. Supp. 430 at 437 n.12 (noting that State bar had never disapproved applicant who answered mental health treatment question affirmatively).

As noted above, federal law does not make particular substances "unlawful" based on their workplace productivity effects. Leaving alcohol aside, many other drugs, used lawfully, have potentially powerful work-affecting effects. See *Ross* v. *Ragingwire Telecommunications, Inc.*, 174 P. 3d 200, 221 (Cal. 2008) (Kennard, J., concurring and dissenting) ("Considered strictly in terms of its physical effects relevant to employee productivity and safety, and not its legal status, marijuana does not differ significantly from many prescription drugs [and] nonprescription medications"); *EEOC* v. *J.B. Hunt Transp. Co.*, 128 F. Supp.2d 117, 130 (N.D.N.Y. 2001). Under the CSA, the legal distinction between marijuana (a Schedule I drug) and those, like morphine and amphetamines, which are available by prescription relate not to the potential to impair productivity, but rather to the (decreasingly tenable) proposition that the former lacks any "currently accepted medical use," see 21 U.S.C. § 812(b)(1); *Gonzales* v. *Raich*, 545 U.S. 1, 27

n.37 (2005) (citing Institute of Medicine, Marijuana and Medicine: Assessing the Science (1999) and *Conant*, 309 F.3d at 640-643 (Kozinski, J., concurring)).

Indeed, this Court has been shown increased skepticism of loose, penumbral reasoning based on CSA Schedules. See *O Centro*, 546 U.S. at 433 (observing that general Schedule I characteristics had not prevented "the Executive and Congress" from allowing hundreds of thousands of Americans to use peyote sacramentally); cf. *Kimbrough* v. *United States*, 552 U.S. 85, 96 (2007) (noting that original Guidelines sentences for cocaine base and powder offenses "did not use [Commission's] empirical approach"); *NORML* v. *Bell*, 488 F. Supp. 123, 139 (D.D.C. 1980) (describing initial marijuana scheduling decision as temporary, reflecting congressional "fear[]" that light penalties "would create the impression that marijuana use was acceptable").

And as Judge Edwards observed, doubting his colleagues' assertion "that 'driving while intoxicated' is clearly related to a security clearance," because "if a man cannot govern himself he cannot be trusted with the government of others," *Greenberg*, 983 F.2d at 296, "more than an epigram" is required "to justify revocation of a security clearance," *id.* As he further explained, "it is common understanding *** that many people engage in questionable activity off of the job that in no way impairs their job performance," *id.*

The "understanding" referenced is of course, even more "common" with respect to off-duty marijuana use by adults like the employees here. Although there is no evidence of prevalence at JPL, millions of

American adults would, if compelled to honestly answer, do so affirmatively, and significant numbers do so with the endorsement of their State government. See *Raich*, 545 U.S. at 5 n.1. Large majorities of Americans (and Californians) disagree with the Schedule I classification, and significant numbers believe the prohibition is "questionable."

Indeed, the difference is that the specific conduct Judge Edwards discussed, intoxicated driving (which is not inquired into on the form), is rightly understood by society – and by OPM – to be far more serious than almost anything at issue here. See, *e.g.*, *Begay* v. *United States*, 553 U.S. 137, 147 (2008); S. Chou, *et al.*, Twelve-Month Prevalence, and Changes in Driving After Drinking United States, 29 Alcohol Res. & Health, 143, 146 (2006) (6 million Americans report driving "after drinking too much" more than once in past 12 months).

B. The Extension of Power Sought Is Not Routine or Unproblematic

Instead of identifying any actual purpose served, the government makes a series of assertions about public- and private-sector hiring and encourages the Court to announce a "broad power" over its contractors' employees based on these claims and loose analogies. Br. 33 (citing *Engquist* v. *Oregon Dep't Agric.*, 128 S. Ct. 2146 (2008)).

As we explained, a private employer (whether concerned about security, reliability, or even symbolism or law-compliance) would *not* be acting responsibly if it proceeded in the way described here. And, depending on the agency's statutory mandate (and the duties involved) a public employer would have difficulties similar to those described in

satisfying the "relevant and necessity" legal standard the government indicates limits federal information collection.

Petitioners' legal argument for extension is notably underwhelming: the only support offered for the claim that contractor-employee status "does not lessen the government's broad authority" Br. 34 n.13, are two cases that expanded the government's constitutional *duties*. *Id.* (citing *Board of County Comm'rs* v. *Umbehr*, 518 U.S. 668 (1996) and *Lefkowitz v. Turley*, 414 U.S. 70 (1973)). And petitioners do not allude to the practical significance of the leap they encourage: "As of 1993, approximately 26 million workers, 22% of the labor force, were employed by federal contractors and subcontractors," *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1324 (D.C. Cir. 1996).[12]

In any event, claims that there are no "meaningful distinctions" between plaintiffs' relationship to the federal government and employment relationships in the private and public sectors suggests a failure to have looked very hard. As described above, federal government information collection implicates concerns that private hiring decisions do not (private employer records are not subject to obligatory routine public disclosure), and private-sector employees are not threatened with

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[12] Similarly, NASA argues that "JPL employees perform duties that are functionally equivalent to those performed by federal civil service employees" Br. 10. But this Court's decisions have not ringingly endorsed such "functional equivalence" arguments. See *Correctional Services Corp.* v. *Malesko*, 534 U.S. 61, 66 (2001); *Richardson* v. *McKnight*, 521 U.S. 399, 408 (1997).

federal prosecution for untruthful answers. Individuals in plaintiffs' position already have "an employer," with responsibilities for their productivity and safety, and it is not routine in the private sector for an employer's personnel decisions to be overruled, peremptorily, by an outside party.

"Candidates for civil service employment," NASA Br. at 3 (not to mention incumbents) have substantive and procedural rights and remedies that contractor employees do not. This Court has repudiated suggestions that federal employees must "take the bitter with the sweet"; but the combination proposed for contractor employees, broad power without protection, is worse.

In any event, petitioners' arguments misconceive the principle they seek to extend. Despite the shorthand, cases like *Engquist* do not confer additional powers, but rather ease constitutional *limits*, to accommodate pursuit of legitimate workplace needs. The power is defined by the character of the interests advanced, not the sanctions threatened; interests in uncovering off-duty activities do not become "job-related" because the government threatens to deprive a person of his job.

Finally, although the court below concluded that plaintiffs' Fourth Amendment challenge was unlikely to succeed, that ruling was not based on any finding of "reasonableness," but rather on its view that "disclosure of information through 'direct questioning' is not a 'search.'" App. 21a. Whether that provisional conclusion is correct, it is significant that the government's effort here could *only* survive by avoiding the "context-specific inquiry, examining closely the competing private and public interests

advanced by the parties," *Chandler* (520 U.S. at 314) indicates.[13]

Not only are the government interests even weaker here than (the signally unimpressive ones) in *Chandler*, but the private intrusion is realistically much greater. Where in *Chandler*, "the results of the test [were] given first to the candidate, who control[led their] further dissemination," and a certification the test was negative was the only information available to the government, 520 U.S. at 318, here disclosure to the government of embarrassing and inculpatory "details" is mandatory, and limits on further use and revelation of the government-controlled record are fugitive. Respondents, moreover, are long-serving privately-employed individuals, not persons newly seeking public office. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

And while mere "questioning," NASA Br. 43, is arguably less intrusive than the screens in *Chandler*, that intuition does not hold when, as here, "compulsion is brought to bear on an individual to force him to make revelations about himself," Fried, 77 Yale L. J. at 489; see *Lefkowitz*, 414 U.S. at 84 ("answers elicited upon the threat of the loss of employment are compelled[.]"). Cf. *Florida* v. *Bostick*, 501 U.S. 429, 435 (1991) (in asking

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[13] The Seventh Circuit decision cited, *Greenawalt* v. *Indiana Dept. of Corrections*, 397 F.3d 587 (2005), did not hold that questioning is beyond the reach of the Constitution, but rather that is the province of the Fifth Amendment. But see *Boyd* v. *United States*, 116 U.S. 616, 633 (1886).

questions, authorities may "not convey a message that compliance with their requests is required").

Conclusion

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-530

IN THE

Supreme Court of the United States

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION, ET AL.,

Petitioners,

– v. –

ROBERT M. NELSON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. SERIOUS QUESTIONS EXIST AS TO WHETHER NASA'S BACKGROUND CHECKS VIOLATE RESPONDENTS' RIGHTS TO ASSOCIATIONAL PRIVACY 5

A. Form 42's Collection Of Membership Information, Even Without Subsequent Public Disclosure, Implicates the Right to Associational Privacy 5

B. NASA's Questions Are Not Narrowly Tailored to Achieve Its Interest in Assessing Respondents' Employment Suitability 8

II. SERIOUS QUESTIONS EXIST AS TO WHETHER NASA'S BACKGROUND CHECKS VIOLATE RESPONDENTS' RIGHT TO INFORMATION PRIVACY 11

A. The Right to Information Privacy Protects Individuals from Dignitary Harm and Government Misuse of Personal Information 11

B. The Right to Information Privacy Protects the Type of Information Sought By the Background Checks, Including Information Disclosed to Third Parties 17

C. Government Collection of Information Implicates the Right to Information Privacy 21

D. The Questionnaires Are Not Narrowly Tailored to NASA's Interest In Assessing Respondents' Employment Suitability 26

E. Proper Safeguards Are Not In Place to Protect the Information From Dissemination Within the Government or Disclosure to the Public 29

i. The Privacy Act Contains Multiple Loopholes Which Allow Dissemination of Information Within the Government 29

ii. The Privacy Act Provides No Reasonable Remedy for Non-Compliance 32

CONCLUSION 34

TABLE OF AUTHORITIES

Cases: *Page(s)*

Aid for Women v. Foulston,
441 F.3d 1101 (10th Cir. 2006) 14-15, 18-19

Alexander v. Peffer,
993 F.2d 1348 (8th Cir. 1993) 15

American Federation of Government Employees v. Department of Housing and Urban Development,
118 F.3d 786 (D.C. Cir. 1997) 15

American Federation of Government Employees v. United States Railroad Retirement Board,
742 F. Supp. 450 (N.D. Ill. 1990) 25, 27

Anderson v. Romero,
72 F.3d 518 (7th Cir. 1995) 15, 18

Andrews v. Veterans Administration of the United States,
838 F.2d 418 (10th Cir. 1988) 33

Barry v. City of New York,
712 F.2d 1554 (2d Cir. 1983) 18, 26

Bates v. City of Little Rock,
361 U.S. 516 (1960) 10

Bloch v. Riber,
156 F.3d 673 (6th Cir. 1998) 19

Borucki v. Ryan,
827 F.2d 836 (1st Cir. 1984) 15

Buckley v. Valeo,
424 U.S. 1 (1976) 6

City of Ontario v. Quon,
130 S. Ct. 2619 (2010) 1

Craig v. Boren,
429 U.S. 190 (1976) 27

Denius v. Dunlap,
209 F.3d 944 (7th Cir. 2000) 14, 17, 19, 23

Doe v. Chao,
540 U.S. 614 (2004) 33

Doe v. City of New York,
15 F.3d 264 (2d Cir. 1994) 15, 19

Doe v. Wigginton,
21 F.3d 733 (6th Cir. 1994) 15

Eagle v. Morgan,
88 F.3d 620 (8th Cir. 1996) 19

Eastwood v. Department of Corrections,
846 F.2d 627 (10th Cir. 1988) ..... *passim*

Fadjo v. Coon,
633 F.2d 1172 (5th Cir. 1981) 18

Federal Election Commission v. Hall-Tyner Election Campaign Committee,
678 F.2d 416 (2d Cir. 1982) 7

Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia,
812 F.2d 105 (3d Cir. 1987) ..... *passim*

Greenville Women's Clinic v. Commissioner,
317 F.3d 357 (4th Cir. 2002) 32

Griswold v. Connecticut,
381 U.S. 479 (1965) 4

James v. City of Douglas,
941 F.3d 1539 (11th Cir. 1991) 15

Lambert v. Hartman,
517 F.3d 433 (6th Cir. 2008) 19

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 6, 7, 8

Nelson v. NASA,
530 F.3d 865 (9th Cir. 2008) 29

Nixon v. Shrink Missouri Government PAC,
528 U.S. 377 (2000) 8

Nixon v. Administrator of General Services,
433 U.S. 425 (1977) ..... *passim*

Olmstead v. United States,
277 U.S. 438 (1928) 24

Pesce v. J. Sterling Morton High School,
830 F.2d 789 (7th Cir. 1987) 23

Pippinger v. Rubin,
129 F.3d 519 (10th Cir. 1997) 31

Plante v. Gonzalez,
575 F.2d 1119 (5th Cir. 1978) 15, 18

Roe v. Wade,
410 U.S. 113 (1973) 12-13

Schneider v. State,
308 U.S. 147 (1931) 10

Sheets v. Salt Lake County,
45 F.3d 1383 (10th Cir. 1995) 19, 20

Shelton v. Tucker,
364 U.S. 479 (1960) 7, 9

Shuman v. City of Philadelphia,
470 F. Supp. 449 (E.D. Pa. 1979) 23-24, 27, 28

Sterling v. Borough of Minersville,
232 F.3d 190 (3d Cir. 2000) 21

Taylor v. Best,
746 F.2d 220 (4th Cir. 1984) 15

Thorne v. City of El Segundo,
726 F.2d 459 (9th Cir. 1983) 27

United States Department of Justice v. Reporters Committee for Freedom of the Press,
489 U.S. 749 (1989) 21

United States Postal Service v. National Association of Letter Carriers,
9 F.3d 138 (D.C. Cir. 1993) 30

United States v. Westinghouse Electric Corp.,
638 F.2d 570 (3d Cir. 1980) 15, 18

Walls v. City of Petersburg,
895 F.2d 188 (4th Cir. 1990) 13, 18, 19, 21

Whalen v. Roe,
429 U.S. 589 (1977) ..... *passim*

Statutes:

5 U.S.C. § 552a(a)(7) 30

5 U.S.C. § 552a(b) 30

5 U.S.C. § 552a(b)(3) 30

5 U.S.C. § 552a(b)(7) 30

5 U.S.C. § 552a(b)(9) 30

5 U.S.C. § 552a(b)(10) 30

5 U.S.C. § 552a(b)(11) 30

5 U.S.C. § 552a(g)(4) 33

5 U.S.C. § 7311 6

18 U.S.C. § 2385 6

Other Authorities:

Francesca Bignami, *European versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining,* 48 B.C. L. Rev. 609 (2007) 33

Sara A. Needles, Comment, *The Data Game: Learning to Love the State-Based Approach to Data Breach Notification Law,* 88 N.C. L. Rev. 267 (2009) 11

James Nelson, *Utah widens probe into immigration list scandal,* L.A. Times, July 19, 2010, http://www.latimes.com/news/ nationworld/ politics/wire/sns-utah-immigration,0,6581818.story 16

President's Council on Integrity and Efficiency, Ad Hoc Committee on Benefit Eligibility Verification, *Eligibility Verification Needed to Deter and Detect Fraud in Federal Government Benefit and Credit Programs* (1998) 31

Harold C. Relyea, CRS Report for Congress, *The Privacy Act: Emerging Issues and Related Legislation* (2002) 30, 31

Seth W. Richardson, *The Federal Employee Loyalty Program,* 51 Colum. L. Rev. 546 (1951) ... 16

Jeffrey Rosen, *The Web Means the End of Forgetting,* N.Y. Times, July 25, 2010, http://www.nytimes.com/2010/07/25/magazine/25 privacy-t2.html?pagewanted=1&_r=1 12

Alan F. Westin, Michael A. Baker, Project on Computer Databanks (National Academy of Sciences), *Databanks in a Free Society: Computers, Record-Keeping and Privacy* (1st ed. 1973) 13

William W. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 Sup. Ct. Rev. 375 (2001) 16

Nick Wingfield, *Microsoft Quashed Effort to Boost Online Privacy*, Wall St. J., Aug. 1, 2010, http://online.wsj.com/article/SB10001424052748703467304575 383530439838568.html 12

Working the Crowd, Economist, March 10, 2007 12

U.S. General Accounting Office, *Privacy Act: OMB Needs to Improve Agency Compliance* (2003) 32

INTEREST OF *AMICUS CURIAE*[1]

The Electronic Frontier Foundation ("EFF") is a nonprofit, member-supported civil liberties organization working to protect rights in the information society. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy. As part of its mission, EFF has often served as counsel or *amicus* in key privacy cases, most recently in *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

The National Aeronautics and Space Administration's ("NASA") collection of personal information from low-risk contractor employees creates major privacy concerns that stem from the absence of clear law or policy regarding the purpose, scope, implementation, and security of these background checks. Overbroad inquiries into medical, sexual, and financial information like the ones presented here are unnecessary for verifying the identities and security risk of low-level contract employees who lack access to classified information or projects relating to national security. As technology advances and makes it easier to collect and aggregate vast amounts of information, we must be cautious to prevent misuse. EFF submits this brief *amicus*

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' letter consenting to the filing of this brief has been filed with the Clerk.

curiae because a ruling overturning the Ninth Circuit's decision to enjoin the inquiries will have far-reaching negative consequences for individual rights.

INTRODUCTION

This case arises from NASA's decision in 2007 to institute background checks of contractor employees pursuant to the National Agency Check with Inquiries ("NACI") guidelines. Respondents are long-time employees of the California Institute of Technology ("CalTech") who work at the Jet Propulsion Lab ("JPL") housing NASA's robotic spacecraft laboratory. By NASA's own admission, respondents are "low-risk" employees and do not work on classified projects. (Br. for the Pet'r 36) [hereinafter "Pet'r's Br."].

The two NACI forms at issue are Standard Form 85 ("SF-85") and Form 42. These forms state that their purpose is to collect information to aid in determining Respondents' "suitability" for employment. SF-85 requires JPL employees to disclose, among other things, any information on past drug treatment or counseling. SF-85 also requires JPL employees to list three people who "know them well" as references, such as "good friends, peers, colleagues, college roommates, etc." Form 42 is then sent to these references, as well as any past employers and landlords. These third parties are asked to submit "any adverse information" about the employee's violations of law, financial integrity, general behavior and conduct, drug and/or alcohol abuse, mental or emotional stability, and "other matters" as well as any "derogatory" information that

they "feel may have a bearing on this person's suitability for government employment."

NASA's suitability matrix describes the specific types of information NASA will use to make the suitability determination. (Foster Decl. ¶ 3; Paradise Decl. ¶ 11.) Listed factors include homosexuality, sodomy, carnal knowledge, incest, bestiality, indecent exposure or proposals, illegitimate children, cohabitation, adultery, mental or emotional issues, minor traffic violations, displaying obscene material, acting drunk, and making obscene telephone calls.

SUMMARY OF ARGUMENT

This case presents the question of whether NASA's unbounded inquiry into respondents' personal lives in order to determine their "suitability" for continued employment can survive constitutional scrutiny. Because serious questions exist as to the inquiries' constitutionality under both the First and Fifth Amendments, the Ninth Circuit's decision to enjoin NASA's background checks of "low-risk," long-time contract employees should be upheld.

First, NASA's questionnaires are so broadly written as to ensure that information about respondents' group affiliations and memberships will be captured and recorded, thus violating respondents' right to associational privacy. This Court has a long history of protecting individuals from the chilling effects of broad associational information collection. Moreover, the questionnaires lack adequate safeguards and NASA has not explained how it will

use the responses to the questionnaires. Without further factual clarification, the program cannot be deemed to be narrowly tailored to achieve the government's stated interest in assessing respondents' suitability for employment. This Court should follow its long-standing associational privacy precedents, recognize that serious questions exist as to whether respondents' individual liberties are properly protected, and allow the preliminary injunction to stand.

Second, the right to information privacy is implicated when the government collects personal and intimate information from contract employees.[2] These questionnaires gather exactly the type of information this right protects. They solicit "any" adverse information about respondents, and thus are not narrowly tailored to solicit information relating to respondents' employment suitability. Moreover, the legal safeguards in place to protect information from government misuse contain gaping loopholes and systemic inadequacies. Serious questions therefore exist as to whether NASA's background checks unconstitutionally threaten respondents' privacy

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[2] Information privacy is intimately linked with associational privacy. The individual interest in avoiding disclosure of personal matters is derived from the privacy protections of the First Amendment. *Whalen v. Roe*, 429 U.S. 589, 599 n.25 (1977) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965)) (arguing that the right to avoid disclosure of personal matters is founded upon the fact that the "First Amendment has a penumbra where privacy is protected from governmental intrusion").

rights even under the less exacting standard of review used in information privacy cases.

Given the hardships that would result from these inquiries into respondents' personal lives, as well as from the potential finding of employment unsuitability, this Court should uphold the decision below and permit assessment of NASA's stated interest in suitability on a more complex factual record.

ARGUMENT

I. SERIOUS QUESTIONS EXIST AS TO WHETHER NASA'S BACKGROUND CHECKS VIOLATE RESPONDENTS' RIGHTS TO ASSOCIATIONAL PRIVACY.

A. Form 42's Collection Of Membership Information, Even Without Subsequent Public Disclosure, Implicates the Right to Associational Privacy.

Form 42 casts so wide a net into respondents' lives that it will surely capture sensitive information about respondents' affiliations and memberships. The Form is given to respondents' friends, neighbors and even "college roommates" – people who would know intimate details of respondents' associations. The Form asks these references for "any" information about respondents' "employment, residence or activities concerning . . . general behavior or conduct [or] other matters." This plain language is broad enough to encompass all of respondents' associational ties.

Indeed, NASA's "Issue Characterization Chart," which is used to evaluate the reference's answers, takes note of whether a respondent "advocates or is a knowing member of an organization that advocates the overthrow of our constitutional form of government," or has ever "advocat[ed], abett[ed], advis[ed] or [taught]" the overthrow of the government.[3] NASA clearly uses this questionnaire to obtain information about respondents' memberships and associational ties.

This Court has "repeatedly found that compelled disclosure [of membership information to the government], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) [hereinafter *Patterson*], this Court held that associational privacy rights were implicated when the NAACP was required to disclose its membership lists to the State of Alabama. It was

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[3] Specific information about Respondents' associational ties with groups that "advocate the overthrow" or "strike[s] against" our government may be relevant, since participation in those groups could constitute statutory debarment from holding a position within NASA. *See* 5 U.S.C. § 7311; 18 U.S.C. § 2385. However, NASA's inquiry is so far-reaching that it will capture information about other associational ties that could *not* statutorily disqualify Respondents from government employment. That NASA seeks information about memberships in political groups, coupled with the broad questions on Form 42, establishes NASA's willingness to gather associational information.

irrelevant that "no direct action" had yet been taken to impair the members' associational rights. *Id.* at 461. Instead, the compelled disclosure itself "may constitute a[n] effective [] restraint on freedom of association." *Id.* at 462. "Even if there were no disclosure to the general public, the pressure upon [plaintiffs] to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure . . . would simply operate to widen and aggravate the impairment of constitutional liberty." *Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960) (government collection of public school teachers' past membership information for employment purposes implicates the First Amendment).

Membership lists and associational information generally are protected from undue government collection because of the collection's likely chilling effect on individuals' freedom of speech and association. In *Patterson*, this Court was concerned that public disclosure of the plaintiffs' association with NAACP would expose the individuals to "public hostility" and "affect adversely the ability of . . . members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Patterson*, 357 U.S. at 462-63. There is thus a "vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association." *Id.* at 462; *see also Fed. Elec. Comm'n v. Hall-Tyner Elec. Campaign Comm.*, 678 F.2d 416, 420 (2d Cir. 1982) (campaign committee supporting Communist Party exempt from Federal

Election Committee recordkeeping and disclosure requirements because "[p]rivacy is an essential element of the right of association and the ability to express dissent effectively").

NASA's inquiries are exactly the kind of collection that implicates the associational privacy right. The questions dig into respondents' private lives and unearth much information about their associational ties. These types of questionnaires essentially condition government employment on relinquishing the right to anonymous association. It is well settled that when the government collects this information, as NASA's inquiries do, judicial action is entirely proper to ensure that the collection does not chill respondents' expressive rights.

B. NASA's Questions Are Not Narrowly Tailored to Achieve Its Interest in Assessing Respondents' Employment Suitability.

"[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Patterson*, 357 U.S. at 460-61. Thus, regulations implicating this right must be narrowly tailored to achieve government interests in the least restrictive manner possible. *Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377, 400 (2000) (strict scrutiny requires least restrictive means). In this case, NASA's forms state their interest in ensuring that respondents are "suitable for the job"; however, these background checks are not narrowly drawn to achieve this interest.

In *Shelton*, this Court considered a challenge to a state statute compelling public school teachers to submit to a hiring authority an unlimited list of every associational tie they had within the previous five years as a condition of employment. 364 U.S. at 480. Like NASA's forms, this list was used to ascertain "the fitness and competence" of the teachers. *Id.* at 485. Although the Court found this purpose to be legitimate, it nevertheless held that the questions were unconstitutionally broad. "The scope of the inquiry required by Act 10 is completely unlimited. . . . It requires [plaintiffs] to list, without number, every conceivable kind of associational tie — social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness." *Id.* at 488. The school board's interests could not "be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.*

This case is no different. Even if NASA does have a legitimate interest in inquiring into respondents' suitability for employment, which is unclear from the record,[4] it cannot ask questions seeking any adverse information that essentially encompasses "every conceivable kind of associational tie." *Id.*

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[4] *Amicus* assumes, but does not concede, that NASA has a legitimate interest in assessing Respondents' suitability for employment.

Other decisions support this conclusion. *Bates v. City of Little Rock* held that an ordinance requiring organizations to furnish city officials with membership lists for tax purposes violated associational privacy rights. 361 U.S. 516 (1960). This Court found "no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists," *id.* at 525, although it recognized that it was necessary to furnish some information to the government for tax purposes. *Id.* at 524.

Similarly, there is no relevant correlation between questions soliciting information about "any" affiliation that respondents have participated in and NASA's stated goals. Posing such sweeping questions to respondents' friends, family, and peers will likely lead to information about respondents' memberships in, for example, an LGBT group, a fraternity, a religious organization, the ACLU, NAACP, or any number of other organizations. NASA has not demonstrated that such information relates to respondents' suitability for employment at the JPL.

NASA cannot be given free rein to examine any and all aspects of their employee's private lives simply by asserting an interest in evaluating respondents' employment suitability. Open-ended questions may be the easiest way to obtain a wide swath of information that the government can sift through for relevant data, but the narrow-tailoring requirement prohibits such sweeping questioning. *Shelton*, 364 U.S. at 489 (quoting *Schneider v. State*, 308 U.S. 147, 161 (1931)) ("[m]ere legislative preferences or beliefs respecting matters of public convenience . . . [are] insufficient to

justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions"). Form 42 captures irrelevant associational information, disclosure of which threatens to chill respondents' willingness to participate in these organizations and express their views and beliefs. Thus, serious questions exist as to whether Form 42 is narrowly tailored to elicit relevant information by the least restrictive means possible.

II. SERIOUS QUESTIONS EXIST AS TO WHETHER NASA'S BACKGROUND CHECKS VIOLATE RESPONDENTS' RIGHT TO INFORMATION PRIVACY.

A. The Right to Information Privacy Protects Individuals from Dignitary Harm and Government Misuse of Personal Information.

NASA's employee background checks also implicate respondents' Fifth Amendment right to information privacy. This right encompasses "the individual interest in avoiding disclosure of personal matters," *Whalen v. Roe*, 429 U.S. 589, 599 (1977), and is meant to protect individuals against dignitary harms. Sara A. Needles, Comment, *The Data Game: Learning to Love the State-Based Approach to Data Breach Notification Law*, 88 N.C. L. Rev. 267, 281 (2009) ("the concept of information privacy deals with harm that is more dignitary in nature").

Such protection is especially important today, when technological advances have created an unparalleled power to harness and use aggregated

data for a variety of purposes. Aggregating tiny bits of information – useless on their own – into databanks and charts now makes up the foundation of entirely new business models and economic sectors. *Working the Crowd*, Economist, March 10, 2007, at 10 (wikis, crowd sourcing technologies and search engines are "unquestionably a huge market"). The very idea of privacy is being challenged as technology companies create new ways to aggregate and use information to track, identify, and influence people.[5]

These concerns, while amplified today, are not novel. This Court's *Whalen* decision, which first articulated the right to information privacy,[6] came on

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[5] *See generally* Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. Times, July 25, 2010, at MM30 *available at* http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=1&_r=1 ("avalanche of criticism" when Facebook reset privacy settings to make them more public and give partner sites access to personal information); Nick Wingfield, *Microsoft Quashed Effort to Boost Online Privacy*, Wall St. J., Aug. 1, 2010 *available at* http://online.wsj.com/article/SB10001424052748703467304575383530439838568.html (online tracking and data aggregation is "pervasive and ever-more intrusive").

[6] *Whalen* derived the right to information privacy from the "right to be let alone," thus indicating that this right protects a broader swath of information than decisional privacy. *Whalen v. Roe*, 429 U.S. 589, 599 n.25 (1977). Another branch of privacy rights, often termed decisional privacy, protects only that information within the "zones of privacy," which includes activities associated with marriage, procreation, child-rearing and education, family relationships, and contraception. *Roe v. Wade*, 410

the heels of an era when many were concerned about the government's increasing aggregation of personal data aggregation in computer systems.[7] Alan F. Westin, Michael A. Baker, Project on Computer Databanks (National Academy of Sciences), *Databanks in a Free Society: Computers, Record-Keeping and Privacy* 4 (1st ed. 1973) ("[b]y the late

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U.S. 113, 152 (1973); *see also Whalen*, 429 U.S. at 599-600 (discussing two types of privacy rights).

[7] Circuit courts have also expressed unease with government information collection. For example, the Fourth Circuit discussed its discomfort with government information collection when considering an information privacy challenge to questions on a city police department's employee background check containing questions about marriage, divorce, children, homosexual relationships, arrest records and financial information:

> In the past few decades, technological advances have provided society with the ability to collect, store, organize, and recall vast amounts of information about individuals in sophisticated computer files. . . . Although some of this information can be useful and even necessary to maintain order and provide communication and convenience in a complex society, we need to be ever diligent to guard against misuse. Some information still needs to be private, disclosed to the public only if the person voluntarily chooses to disclose it.

Walls v. City of Petersburg, 895 F.2d 188, 194-95 (4th Cir. 1990).

1960s, the 'databank issue' had become one of the most widely discussed and emotionally laden civil-liberties questions facing American society"); *cf. Whalen*, 429 U.S. at 605 (noting "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files"). Soon thereafter, this Court clarified the right's scope as protecting information in which one has a "legitimate expectation of privacy," and subjected the collection of such information to a balancing test weighing the individual's privacy interest against the government's interest in disclosure.[8] *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 458 (1977).

The broad acceptance of this right in lower courts demonstrates judicial recognition that the potential for government misuse is greatly increased when information is organized in accessible databases.[9] Indeed, government misuse has occurred

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[8] *Nixon* specifically balanced "public figure [status,] his lack of any expectation of privacy in the overwhelming majority of the materials, [] the important public interest in preservation of the materials . . . the virtual impossibility of segregating the small quantity of private materials [from non-private materials]. . . . the Act's sensitivity to . . . legitimate privacy interests . . . [and] the unblemished record of the archivists for discretion." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 465 (1977); *see also Denius v. Dunlap*, 209 F.3d 944, 956 n.7 (7th Cir. 2002) (*Whalen* and *Nixon* employed a balancing test when analyzing information privacy rights).

[9] Currently, a majority of Circuits recognize the right to information privacy. *Aid for Women v. Foulston*,

in the past. The right to information privacy is thus necessary to ensure that the government treats individuals and their personal information with respect.

Perhaps the most notorious example of misuse is the McCarthy era personnel investigations used to

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441 F.3d 1101, 1116 (10th Cir. 2006) (recognizing informational privacy right protecting disclosure of personal information); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (recognizing constitutional right to privacy of medical information); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (recognizing "privacy in personal information"); *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993) (recognizing a "confidentiality interest"); *James v. City of Douglas*, 941 F.3d 1539, 1543 (11th Cir. 1991) (recognizing the confidentiality branch of the right to privacy); *Borucki v. Ryan*, 827 F.2d 836, 840-42 (1st Cir. 1984) (suggesting a right to confidentiality exists, but stating it was unclear if disclosure of information implicated this right); *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984) ("the right to privacy includes an individual interest in disclosing personal matters") (citation and internal quotations omitted); *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-580 (3d Cir. 1980) (there is a constitutional right to privacy of medical records); *Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978) (recognizing "the right to confidentiality"); *but see Am. Fed'n of Gov't Employees, AFL-CIO v. Dep't of Housing and Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing "grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information"); *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (no general right to nondisclosure of private information).

ferret out alleged communist supporters. Federal employees during the 1950s were forced to disclose personal facts via personnel forms as part of an employee loyalty program. *See* Seth W. Richardson, *The Federal Employee Loyalty Program*, 51 Colum. L. Rev. 546, 546 (1951). The personnel forms, like the background checks at issue here, applied "only to employees, and [were] initiated by the Government as an employer solely for the purpose of ascertaining employability." *Id.* As a result of these inquiries, hundreds of people lost their jobs due to mere suspicions that they sympathized with the Communist Party. William W. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 Sup. Ct. Rev. 375, 421-22 (2001).

More recently, members of the Utah Department of Workforce Services ("DWS") used information contained in DWS's database to compile a list allegedly identifying thousands of illegal immigrants. James Nelson, *Utah widens probe into immigration list scandal*, L.A. Times, July 19, 2010.[10] The list was sent to law enforcement agencies and state lawmakers, along with a letter demanding that the named individuals be deported. *Id.* No specific information on the list has been released to the public. Nevertheless, the dissemination of private information from government databases to other government employees in order to demand deportation is a grave dignitary harm.

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[10] *Available at* http://www.latimes.com/news/nationworld/politics/wire/sns-utah-immigration,0,6581818.story.

The right to information privacy is meant to mitigate and prevent incidents like the ones described above.[11] Private information need not be publicly disclosed to cause dignitary harm; government misuse is sufficient. The right to information privacy is necessary to check the government's powers to collect personal information by balancing the risk of misuse against the government's legitimate need to collect this information.

B. The Right to Information Privacy Protects the Type of Information Sought By the Background Checks, Including Information Disclosed to Third Parties.

NASA seeks exactly the type of information protected by the right to information privacy. The questionnaires collect information about respondents' medical treatment for drug dependencies and abuse, financial integrity, mental or emotional stability, general behavior or conduct, excessive alcohol consumption, and "other matters." It is well settled among circuit courts that the Fifth Amendment protects this information from indiscriminate government collection. *See, e.g., Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000) (medical

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[11] The information released was not associational information, nor was the list based on information traditionally protected by "zones of privacy." Thus, it is unlikely that those targeted could claim violations of the right of associational privacy or the right of decisional privacy. The right of information privacy fills in this gap.

information); *Anderson v. Romero*, 72 F.3d 518, 522 (7th Cir. 1995) (same); *Walls v. City of Petersburg*, 895 F.2d 188, 194 (4th Cir. 1990) (financial information); *Eastwood v. Dep't of Corr. of State of Okl.*, 846 F.2d 627, 631 (10th Cir. 1988) (sexual information); *Fraternal Order of Police, Lodge No. 5 v. City of Phila.*, 812 F.2d 105, 116 (3d Cir. 1987) [hereinafter *"FOP"*] (citing *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983)) ("financial information . . . is covered by the right to privacy" and behavioral information like "private drinking habits and more secretive gambling. . . . is inherently private [and] is entitled to protection"); *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981) (citing *Plante v. Gonzales*, 575 F.2d 1119, 1132-33 (5th Cir. 1978)) ("financial disclosure laws raised issues within the scope of the confidentiality branch of the privacy right"); *U.S. v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-80 (3d Cir. 1980) (medical records).

The questionnaires also solicit information about respondents from third party references. The government argues that this information is not protected because information disclosed to third parties is not private. (Pet'r's Br. 32.) This is untrue. The right to information privacy protects personal information in which one has a "legitimate expectation of privacy,"[12] *Nixon*, 433 U.S. at 458, even if that information is known to third parties.

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[12] Circuit courts have similarly interpreted the right's coverage, creating a general consensus that the constitution protects matters reasonably expected to be private and confidential. *See Aid for Women v. Foulston*,

For example, in *Whalen*, a patient's medical information was deemed constitutionally protected, even though this information had been communicated to third party doctors. *Whalen*, 429 U.S. at 589.

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441 F.3d 1101, 1116 (10th Cir. 2006) (quoting *Sheets v. Salt Lake County*, 45 F.3d 1383, 1387 (10th Cir. 1995)) ("an individual is [] protected from disclosure of information where the individual has a legitimate expectation . . . that it will remain confidential"); *Denius*, 209 F.3d at 957-58 (courts must evaluate "the existence and extent of constitutional protection for confidential information in terms of the type of information involved") (citation omitted); *Doe*, 15 F.3d at 269 (information privacy protect information that one is "normally entitled to keep private"); *Walls v. City of Petersburg*, 895 F.2d 188, 192-93 (4th Cir. 1990) ("personal, private information . . . is protected by one's constitutional right to privacy"); *Eastwood v. Dep't of Corr. of State of Okl.*, 846 F.2d 627, 631 (10th Cir. 1988) (interest in avoiding disclosure of personal matters protects "individual[s] from government inquiry into matters in which it does not have a legitimate and proper interest"). The Sixth Circuit is the sole Circuit that interprets the right as only protecting fundamental rights. *Lambert v. Hartman*, 517 F.3d 433, 442 (6th Cir. 2008) (citing *Bloch v. Riber*, 156 F.3d 673, 684 (6th Cir. 1998)) (holding that although plaintiff had an expectation of privacy in her social security number, she failed to show a fundamental right was at issue; court thus declined to apply balancing test to determine whether informational privacy rights had been violated). The Eight Circuit has hinted at adopting a stricter construction of privacy rights, but it is unclear whether they have done so. *See Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (right to privacy protects only "highly personal matters representing the most intimate aspects of human affairs").

Similarly, the presidential papers at issue in *Nixon* included communications by the President to third parties, including "extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer, and clergyman, and his close friends, as well as personal diary dictabelts and his wife's personal files." *Nixon*, 433 U.S. at 430 (citation omitted).

The risks inherent in government data collection do not disappear merely because the personal information is known to some third parties. Medical, sexual, and financial issues are often disclosed to doctors, family members, or friends; this does not rob that information of its personal nature. Therefore, in the Fifth Amendment context, one's expectation of privacy depends on the "nature" of the matter, and an individual can maintain a legitimate expectation of privacy despite a limited disclosure to others.

In *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995), information about the plaintiff written in his wife's diary was constitutionally protected because of the personal nature of the information it contained, even though this private information was known to and gathered from his wife. The court's analysis turned on the "intimate and personal nature" of the statements in the diary, and the fact that the plaintiff "legitimately expected his wife's diary to remain confidential." *Id.* at 1388 ("that Mr. Sheets did not author the information does not prohibit him from having a distinct privacy interest in the dissemination of information written about the personal aspects of his life").

In *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000), a teenage boy and his friend were arrested for underage drinking and the boy was forced to reveal his sexual orientation to a police officer. The boy had clearly disclosed this information to his friend, with whom the police officer suspected the boy was having sexual relations. *Id.* at 192. Despite this disclosure, the information remained sufficiently personal to the boy that the officer's threats to disclose his homosexuality to his grandfather drove him commit suicide. *Id.* at 193.

"In an organized society, there are few facts that are not at one time or another divulged to another." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989). The mere fact that others know respondents' private information does not remove their legitimate expectations of privacy. It is integral to our dignity and identity to retain control over who receives our personal information. *Id.* at 763 ("privacy encompass[es] the individual's control of information"). The right to information privacy therefore covers government questionnaires soliciting personal information from third parties.

C. Government Collection of Information Implicates the Right to Information Privacy.

The "interest in avoiding disclosure of personal matters" encompasses direct disclosure *to* the government as well as disclosure *by* the government to the public. *Walls*, 895 F.2d at 188 (considering government employee's challenge to background

check); *Eastwood*, 846 F.2d at 631 ("constitutionally protected right [to informational privacy] is implicated when an individual is forced to disclose information regarding personal sexual matters" to government employer); *FOP*, 812 F.2d at 110 ("constitutional protection against disclosure of personal matters [] is at issue" in Fifth Amendment challenge to police department employee background check). Even without actual or potential public disclosure, employment conditioned on respondents' disclosure of personal information to the government – which *amicus* will refer to as the government's collection of personal information – implicates respondents' information privacy rights. Recognition of the risk of disclosure "implicit" in government aggregation of personal data led to the creation of the information privacy right. *Whalen*, 429 U.S. at 605-606 (information collection "by a system that did not contain comparable security provisions [to the ones at issue]" could violate the information privacy right).

This Court reiterated this point in *Nixon* by recognizing that privacy rights could be infringed by giving government employees – *not* the public – access to Nixon's presidential papers for the purpose of separating his personal papers from public documents. *Nixon*, 433 U.S at 425. Nixon had "a legitimate expectation of privacy in his personal communications" against government intrusion, even though there would be no subsequent disclosure to the public. *Id.* at 459, 465 ("purely private papers and recordings will be returned" to the President). Disclosure of his personal papers to government employees implicated his information privacy right and triggered use of a balancing test to weigh the

competing interests. *Nixon*, 433 U.S. at 465 (balancing the privacy interest against a variety of factors, including presidential status, public interest, and the limited intrusiveness of the screening process).

Other courts have since recognized that "the federal right of confidentiality might in some circumstances be implicated when a state conditions continued employment on the disclosure of private information" to employers. *Denius*, 209 F.3d at 955 (citing *Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 797 (7th Cir. 1987)). In *FOP*, the Third Circuit held that questions on employee applications for the City of Philadelphia Police Department's Special Investigation Unit, which were viewed only by government officials, impermissibly infringed the right to privacy. 812 F.2d at 105. In *Denius*, requiring the plaintiff to report financial information to the state via an authorization form needed to renew the plaintiff's employment contract with the government "infringe[d] Denius's right of privacy in confidential information."[13] 209 F.3d at 958. Additionally, in *Shuman v. City of Philadelphia*, the court concluded that the right to information privacy protected a police officer's compelled disclosure of extramarital affairs to his employers by analogizing to associational privacy cases holding that collection of private information is, in itself, harmful. 470 F. Supp. 449, 458

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[13] Nevertheless, because a person's privacy interest in financial information was not clearly established prior to the instant case, the defendant was entitled to qualified immunity on that narrow issue. *Denius*, 209 F.3d at 958.

(E.D. Pa. 1979) ("[i]f there is a constitutionally protected 'zone-of-privacy,' [sic] compelled disclosure in and of itself may be an invasion of that zone, and therefore, a violation of protected rights").

Subjecting government collection of information to judicial scrutiny protects individuals from misuse of sensitive information. Private matters, once known by government employers, can be used in improper and retaliatory ways even in the absence of actual or potential public disclosure. The information could be widely distributed to other government agencies, such as the IRS or FBI. It can also be used to harass and intimidate employees. These risks severely burden the "right to be let alone." *Whalen*, 429 U.S. at 599 n.25 (quoting *Olmstead v. U.S.*, 277 U. S. 438, 478 (1928)) (right to information privacy is derived from the "right to be let alone").

A prime example is *Eastwood*, in which the court considered whether qualified immunity applied to a departmental investigator who assessed an employee's sexual harassment claim by interrogating the employee about her sexual history. 846 F.2d at 631. Not only was this information's forced disclosure an affront to the plaintiff's dignity, but there was a danger that the government would use the information "to harass plaintiff into dismissing her complaint and quitting her job." *Id.* The court thus held that the "constitutionally protected right [to informational privacy] is implicated when an individual is forced to disclose information regarding personal [] matters" to government employers. *Id.* at 630-31.

In another case the government sought to question low-level government employees – similarly situated to respondents – about any and all past illegal drug use, indicating that this information may be used to terminate the employee. *Am. Fed'n of Gov't Employees v. U.S. R.R. Retirement Bd.*, 742 F. Supp. 450, 454 (N.D. Ill. 1990) [hereinafter "*R.R. Retirement Bd.*"] (questions about illegal drug use "do implicate 'the federal right of confidentiality'" because they "seek highly personal information" and drug use would "disqualify" the employee). Concerns about government misuse permeated the opinion, with the court emphasizing that the Fifth Amendment imparts a "right to keep certain information from the government, particularly when the government has expressed an intent to use that information as a basis for taking some adverse action against the individual." *Id.* at 455. These concerns, combined with the fact that "it is not at all clear to this court how a computer operator working for the Railroad Retirement Board could jeopardize national security," led the court to hold that the government could not "require its employees to divulge their most intimate secrets." *Id.*

NASA's questionnaires seek similarly sensitive information. SF-85 requires employees to divulge information related to illegal drug use, including the dates of the use, the type of drugs and an explanation of the use. Form 42 expressly solicits "derogatory" information about respondents.[14] NASA's "Issue Characterization Chart" lists the type of information

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[14] Form 42 states that references may use the form to convey "derogatory as well as positive information."

that the questionnaires seek, including such general and potentially embarrassing behavioral information such as carnal knowledge, obscene phone calls, indecent exposure and acting drunk. NASA could easily use this information to intimidate, harass, embarrass or even terminate respondents for no legitimate employment reason. The right to information privacy is designed to prevent these effects.

D. The Questionnaires Are Not Narrowly Tailored to NASA's Interest In Assessing Respondents' Employment Suitability.

Information privacy is generally reviewed under an intermediate scrutiny standard.[15] *FOP*, 812 F.2d at 110 (citing *Barry*, 712 F.2d at 1559). Thus, for narrow tailoring purposes, questions must be substantially related to legitimate government

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[15] Form 42's breadth also may capture information about abortions, birth control, marriage, etc., which implicates fundamental liberties. The Third Circuit has observed that "[i]f [the] exercise of rights protected by the autonomy interest might be deterred, a more stringent scrutiny would be appropriate." *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 812 F.2d 105, 114 n.5 (3d Cir. 1987). Therefore, some kind of heightened form of scrutiny may be appropriate. Moreover, "the federal courts also apply stricter scrutiny when there is unguarded public disclosure of confidential information." *Id.* at 111. As *amicus* argues, *infra*, there are serious concerns about the adequacy of safeguards here, providing another reason for more stringent review.

interests. *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (describing intermediate scrutiny in the context of equal protection and gender classifications). The government's interest in conducting employee background checks does not confer free license to mine employee's lives for any adverse information that may or may not relate to the employee's security risk and on the job performance. *R.R. Retirement Bd.*, 742 F. Supp. at 454 (the government does not have "unbridled license to require anything it wants of its employees").

For example, in *Eastwood*, the Tenth Circuit held that the questions posed to a state employee about her sexual history in order to assess the legitimacy of her sexual harassment claim were so broad that they violated her information privacy rights. 846 F.2d at 631. Even assuming the questions were intended to advance a legitimate state interest in confirming her complaint, "there exists little correlation between plaintiff's sexual history" and the stated government interest. *Id.* The questioner "might establish carefully tailored questions regarding an applicant's sexual past . . . but it could not justify an 'unbounded, standardless inquiry' into the plaintiff's personal life." *Id.* (citing *Thorne v. City of El Segundo*, 726 F.2d 459, 470 (9th Cir. 1983)).

Similarly, the plaintiff in *Shuman* was dismissed from his position as an officer in the Philadelphia Police Department after refusing to answer questions about an adulterous affair in violation of Philadelphia's Home Rule Charter § 10-110. 470 F. Supp. at 443-44. Like Form 42, these policies allowed the police department to inquire into

"any and all aspects" of the officers' personal lives. *Id.* at 460. There were no standards in place to ensure the questions were targeted towards eliciting job-related information, and the officers were required to answer on penalty of losing their jobs. *Id.* "The Police Department simply cannot have a *carte blanche* to investigate all aspects of a police officer's personal life" and the government's legitimate interest in investigating an officer's personal life only extended to information related to the plaintiffs on the job performance. *Id.* at 460. The overbroad inquiries led the court to conclude: "[w]e have no doubt that such a policy is unconstitutional." *Id.*

Form 42 is similarly overbroad; in fact, it is unclear exactly what information NASA hopes to gain from this inquiry. The form itself offers no guidance as to what particular information it seeks. The only hint we have is NASA's suitability matrix, which lists information such as sexual orientation, obscene telephone calls, cohabitation, illegitimate children, and carnal knowledge as considerations for suitability.

Petitioners argue that because Form 42 states that it seeks information relevant to the applicant's suitability for employment, it is narrowly tailored. (Pet'r's Br. 32.) This is a tautology. NASA cannot claim that its form is narrowly drawn to elicit information regarding suitability simply by stating that it intended to elicit information regarding suitability. NASA must make clear what types of information relate to suitability and narrowly tailor its questions accordingly.

The Ninth Circuit correctly found that NASA has "steadfastly refused to provide any standards narrowly tailoring the investigations to the legitimate interests they offer as justification." *Nelson v. NASA*, 530 F.3d 865, 881 (9th Cir. 2008). There are thus serious questions as to the constitutionality of Form 42's requests for information unrelated to any legitimate government interest.

E. Proper Safeguards Are Not In Place to Protect the Information From Dissemination Within the Government or Disclosure to the Public.

The likelihood of unauthorized disclosure is a "crucial factor[]" in the information privacy balancing test, *FOP*, 812 F.2d at 105, because when information is aggregated, the risk of unauthorized dissemination naturally increases. Contrary to the government's assertions, the Privacy Act does not provide meaningful protection because of systemic problems allowing for the widespread, indiscriminate dissemination of information throughout the federal government.

i. The Privacy Act Contains Multiple Loopholes Which Allow Dissemination of Information Within the Government.

As *amicus* discussed *supra*, the right to information privacy encompasses disclosure to the government. The Privacy Act, however, does not adequately protect respondents' information from disclosure within the federal government. In fact, the

Act contains *twelve* exceptions that effectively allow widespread dissemination of personal information throughout the government. 5 U.S.C. § 552a(b).

For example, information can be disclosed to "another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity" upon written request, § 552a(b)(7), to "either House of Congress," § 552a(b)(9), to the Comptroller General, § 552a(b)(10), or to a court of competent jurisdiction, § 552a(b)(11). These exceptions would allow respondents' private information to be disclosed to a variety of government officials. The Privacy Act's history reveals that such intra-government disclosures are a pervasive problem. For example, in 2000, close to 33% of agencies had disclosed personal information to other agencies. Harold C. Relyea, CRS Report for Congress, *The Privacy Act: Emerging Issues and Related Legislation* 8 (2002) [hereinafter "CRS Report"].

Particularly problematic is the "routine use" exception, under which the government may disclose personal information for "a purpose which is compatible with the purpose for which it was collected." § 552a(a)(7), (b)(3). The routine use exception has been interpreted broadly. *U.S. Postal Serv. v. Nat'l Assoc. of Letter Carriers, AFL-CIO*, 9 F.3d 138, 143 (D.C. Cir. 1993) ("routine use exception to the Privacy Act . . . is in the control of the government agency"). The exception essentially allows "disclosure of information collected by one agency for a specific program, to another agency for

eligibility verification in an unrelated program, [to] be considered a routine use."[16] CRS Report 12 (quoting President's Council on Integrity and Efficiency, Ad Hoc Committee on Benefit Eligibility Verification, *Eligibility Verification Needed to Deter and Detect Fraud in Federal Government Benefit and Credit Programs* (1998), at p. 3). Inter-agency disclosures are thus widespread, and compromise respondents' privacy interests.

SF-85 outlines a variety of questionable routine uses. Routine Use ("RU") 2 states that personal information may be disclosed to the Department of Justice, courts, or other adjudicative bodies if it is deemed "relevant and necessary" for use in litigation, essentially opening respondents' lives to law enforcement authorities for investigation. RU 7 states that information can also be publicly disclosed to "the news media or the general public" if the disclosure is in the "public interest" and would "not constitute an unwarranted invasion of personal privacy."

The determination that a public disclosure to the media would "not constitute an unwarranted invasion of personal privacy" or that information is "relevant and necessary" to litigation is left completely up to NASA's discretion. Because NASA

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[16] For example, in *Pippinger v. Rubin*, an employee's romantic affair was disclosed during the deposition of a third party for a completely unrelated administrative proceeding. 129 F.3d 519 (10th Cir. 1997). Nevertheless, the court upheld this disclosure as a "routine use" under the Privacy Act. *Id.* at 532.

can release private information upon these discretionary determinations, the Privacy Act at best gives respondents an optional measure of protection.

The Privacy Act's exceptions and listed routine uses constitute "gaping holes" that put respondents at risk of having their information disclosed to an unlimited number of people within the government. *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health and Env't Control*, 317 F.3d 357, 375 (4th Cir. 2002) (King, J. dissenting) (exceptions allowing collected information to be revealed during licensure procedures and inspection render safeguards inadequate). In light of the importance of security measures preventing the aggravation of the "impairment of liberty" inherent in the information's collection, this Court should hold that the safeguards at issue are patently inadequate.

ii. The Privacy Act Provides No Reasonable Remedy for Non-Compliance.

It is well known that Privacy Act compliance and enforcement are weak. *See* U.S. General Accounting Office, *Privacy Act: OMB Leadership Needed to Improve Agency Compliance* 2 (2003) ("[i]f these implementation issues and the overall uneven compliance are not addressed, the government will not be able to provide the public with sufficient assurance that all legislated individual privacy rights are adequately protected"). Moreover, when the Privacy Act is violated, there are significant obstacles to obtaining a reasonable judicial remedy.

For example, respondents cannot be made whole if information is negligently released; the Privacy Act allows for statutory damages only if the agency that released the information "acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4). In *Andrews v. Veterans Administration of the United States*, plaintiff's private personnel files were released to a union representative without being properly sanitized. 838 F.2d 418 (10th Cir. 1988). The court found that because the release of the information was merely negligent, there could be no liability under the Privacy Act's civil remedies provisions. *Id.* at 425.

Even if respondents could show that the disclosure was made intentionally or willfully, they cannot receive statutory damages unless they can show the privacy breach resulted in actual damage. *Doe v. Chao*, 540 U.S. 614 (2004). Although the right to information privacy recognizes the dignitary harm from disclosure of private information, under the Privacy Act, disclosure itself is not enough to merit a damages award. *Id.*

The Privacy Act's requirements that plaintiffs show intentional release and actual damages do not sufficiently protect them against the dignitary harms implicit in the government's collection of their personal information. Francesca Bignami, *European versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. Rev. 609, 633 (2007) ("individuals have a very difficult time establishing the injury necessary to recover for most violations of the [Privacy Act] — what court would award damages because a

government agency asked . . . too many irrelevant questions?"). The Privacy Act's inadequacies raise serious questions as to the adequacy of safeguards protecting respondents' constitutional right to information privacy.

CONCLUSION

The government background checks at issue compromise respondents' rights to privacy under both the First and Fifth Amendments. Their liberty is threatened by broad questions that can capture all associational ties, and their dignity is put at risk by NASA's collection and inadequate protection of vast amounts of personal information. For the reasons stated above, this Court should affirm the Ninth Circuit's decision to preliminarily enjoin NASA's background investigations, and permit the parties to develop a more complete factual record.

Respectfully Submitted.

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AMICUS CURIAE BRIEF

No. 09-530

IN THE

Supreme Court of the United States

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, et al.,

Petitioners,

v.

ROBERT M. NELSON, et al.,

Respondents.

On a Writ of Certiorari to
The United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF THE RESPONDENTS

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130 B 41

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. THE RIGHT TO INFORMATIONAL PRIVACY IS WELL-RECOGNIZED 7

A. Scholars Recognize the Importance of the Right to Informational Privacy 7

B. International Courts Recognize the Right to Informational Privacy 16

II. THE PRIVACY ACT WOULD NOT SUFFICIENTLY PROTECT RESPONDENTS' INFORMATION 20

A. NASA's Narrow Interpretation of "System of Records" Would Not Sufficiently Protect Respondents' Information 21

B. The Privacy Act Includes Broad Exceptions that Permit Disclosure of Sensitive Documents by NASA 25

C. The Privacy Act Does Not Protect Respondents' Information Against NASA's Data Breaches 28

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Arroyo v. Rattan Specialties, Inc., 117 P.R. Dec. 35 (1986) 19

Artz v. U. S., 275 Fed. Appx. 569 (8th Cir. 2008) 23

Baker v. Dep't of Navy, 814 F.2d 1381 (9th Cir. 1987), *cert. denied*, 484 U.S. 963 (1987) 22

Case C-28/08 P, *Commission v. Bavarian Lager*, Court of Justice of the European Union, June 29, 2010..... 19

Case of S. and Marper v. The United Kingdom, Applications nos. 30462/04 and 30566/04, Eur. Ct. H.R., Dec 4, 2008..... 17, 18

Covert v. Herrington, 876 F.2d 751 (9th Cir. 1989) 26

Hawaii Psychiatric Soc'y v. Ariyoshi, 481 F.Supp. 1028 (D. Haw. 1979)..... 7

Henke v. U.S. Dep't of Commerce, 83 F. 3d 1453 (D.C. Cir. 1996) 23

In re: Census Act, 30 BVerfGE 1, 42-43 (Dec. 15, 1983) 16

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 7

Olmstead v. U.S., 277 U.S. 438 (1928) 8

Panteleyenko v. Ukraine, App. No. 11901/02, Eur. Ct. H.R. 43 (2004) 18

Randall v. NASA, 14 F.3d 1143 (6th Cir. 1994) . 21, 23

Rechnungshof v. Österreichischer Rundfunk and Others, 2003 E.C.R. (May 20, 2003)..... 19

Savarese v. U.S. Dep't of Health, Education & Welfare, 479 F. Supp. 304 (N.D. Ga. 1979)..... 22, 24

Tucson Woman's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004) 7

Whalen v. Roe, 429 U.S. 589 (1977)..... 7, 16

STATUTES

5 U.S.C. § 552a..... 20, 21, 22, 25, 26

E-Government Act of 2002, Pub. L. No. 107-347 (Dec. 17, 2002) 30

OTHER AUTHORITIES

Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999) 10

Anita Ramasastry, *Tracking Every Move You Make: Can Car Rental Companies Use Technology to Monitor Our Driving? A Connecticut's Court's Ruling Highlights an Important Question*, Findlaw News, Aug, 23, 2005..... 9

David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL. J. COMPUTER & INFO. L. 1 (1999)..... 16

David Chaum, *Achieving Electronic* Privacy, SCIENTIFIC AMERICAN, Aug. 1992..... 13

David H. Flaherty, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES (1998)..... 15

Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT'L L.J. 211 (2008) 16

Gary T. Marx, Commentary, *At-Home Spying: Privacy Wanes as Technology Gains; Surveillance may be legal, but is that the only standard?*, Los Angeles Times, May 28, 2002 10

Helen Nissenbaum, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 92 (2010) 11

INV Form 42, *Investigative Request for Personal Information* *27*

Javier Thibault Aranda, *Information Technology and Workers' Privacy: A Comparative Study: Part II: National Studies: Information Technology and Workers' Privacy: The Spanish Law*, 23 COMP. LAB. L. & POL'Y J. 431 (2002) 18

Jeffrey Rosen, *Why Privacy Matters*, WILSON Q., Autumn 2000 10

Jerry Kang, *Cyberspace Privacy: A Primer and Proposal*, 26 Hum. Rts. 3 (1999) 11

Jerry Kang, *Info. Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998) 11

Julianne M. Sullivan, Comment, *Will The Privacy Act of 1974 Still Hold up in 2004? How Advancing Technology Has Created a Need for Change in the "System Of Records" Analysis*, 39 CAL. W.L. REV. 395 (2004) 24

Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000) 8

Luis Anibal Aviles Pagan, *Articulo: Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico,* 67 Rev. Jur. U.P.R. 343 (1998)..... 19

Office of Pers. Mgmt., *Questionnaire for Non-Sensitive Positions* (SF-85)..... 26

Pamela Samuelson, Privacy As Intellectual Property, 52 STAN. L. REV. 1125 (2000)..... 9

Paul Schwartz, *The Computer in German and American Constitutional Law: Toward an American Right of Informational Self-Determination*, 37 AM. J. COMP. L. 675 (1989)..... 17

Peter G. Neumann, *The Big Picture,* COMM. OF THE ACM, Sept. 2004 13

Philip E. Agre, *Beyond the Mirror World: Privacy and the Representational Practices of Computing, in* TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE (Philip E. Agre & Marc Rotenberg eds., 1997)..... 11

Privacy Act of 1974; Privacy Act System of Records, 74 Fed. Reg. 50,247 (Sept. 30, 2009)..... 26

Robert Ellis Smith, OUR VANISHING PRIVACY AND WHAT YOU CAN DO TO PROTECT YOURS 4 (1993) 14

Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) 7

U.S. Gov't Accountability Office, *Data Breaches are Frequent, but Evidence of Resulting Identity Theft is Limited; However, the Full Extent is Unknown* (2007)..... 28, 29

U.S. Gov't Accountability Office, *NASA Needs to Remedy Vulnerabilities in Key Networks* (2009) 29, 29, 30, 31, 32

U.S. Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* (1977) . 23, 24, 25

Whitfield Diffie & Susan Landau, PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION (1998) 12

INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center (EPIC) is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.[2]

EPIC has participated as *amicus curiae* in several cases before this Court and other courts concerning privacy issues, new technologies, and Constitutional interests, including *Doe v. Reed*, 130 S. Ct. 2811 (2010); *Quon v. City of Ontario*, 130 S. Ct. 2619 (2010); *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. On May 5, 2010, Respondents lodged with the Court their "consent to the filing of amicus curiae briefs, in support of either party or of neither party." EPIC files Petitioners' letter of consent contemporaneously with this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and the brief was not authored, in whole or in part, by counsel for a party.

[2] EPIC is grateful for the work of EPIC Clerks Musetta Durkee, Rachel Gozhansky, Cynthia Grady, Gautam Hans, Matthew Lijoi, Eric Lindgren, Laura Moy, Reuben Rodriguez, and Geoff Schotter, who contributed to the preparation of this brief.

Circuit of Nevada, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *National Cable and Telecommunications Association v. Federal Communications Commission*, 555 F.3d 996 (D.C. Cir. 2009); *Bunnell v. Motion Picture Association of America*, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a particular interest in protecting individuals' right to informational privacy.

EPIC supports the right of individuals to keep confidential their personal health information. EPIC has filed several *amicus* briefs concerning the critical importance of limiting the collection and disclosure of sensitive medical data.[3] This right is particularly important in light of the incomplete privacy protections provided by NASA's implementation of the Privacy Act and the substantial risk of data breaches. EPIC argues in this brief that NASA should not compel scientists to disclose personal health information as a condition of employment.

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[3] *See, e.g., IMS Health v. Ayotte*, 550 F.3d 42 (1st Cir. 2008) *cert. denied* 129 S. Ct. 2864 (2009), *IMS Health Inc. v. Sorrell*, 631 F. Supp. 2d 429 (D. Vt. 2009), *appeal docketed*, No. 09-1913 (2d Cir. Aug. 1, 2009).

The Ninth Circuit's determination in the present case protects the informational privacy of scientists working at the Jet Propulsion Laboratory. If the Court overrules the Ninth Circuit, it will require these scientists to disclose sensitive, personal information that is insufficiently protected and at substantial risk of disclosure.

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SUMMARY OF THE ARGUMENT

The right to informational privacy protects critical Constitutional values. Since the Court's 1977 analysis in *Whalen*, scholars and international courts have described the importance of the right to informational privacy and opined on the right's vital role in safeguarding individuals from data collection and disclosure. The Ninth Circuit decision at issue in this case protects NASA scientists' right to informational privacy. Constitutional privacy safeguards are particularly important in this case because NASA's failure to meet its obligations under the Privacy Act and the agency's poor data security practices pose substantial risks to the scientists' personal information.

ARGUMENT

I. The Right to Informational Privacy is Well-Recognized

The parties have briefed U.S. courts' treatment of the right to informational privacy. Informational privacy rights have not been often litigated in this Court since *Whalen* and *Nixon*.[4] However, federal courts have interpreted informational privacy rights to protect individuals' freedom to withhold personal, sensitive health information from the government.[5] This interpretation supports Respondents ("the Scientists") in this case, and is consistent with the conclusions reached by scholars and international courts.

A. Scholars Recognize the Importance of the Right to Informational Privacy

Before *Whalen* and *Nixon*, Warren and Brandeis described the broad legal foundation of the right to privacy, describing privacy rights as "not rights arising from contract or from special trust, but are rights as against the world."[6] And Justice Brandeis famously described the right of privacy as "the most comprehensive of rights and the right most valued by

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[4] *Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977).

[5] *E.g. Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 537 (9th Cir. 2004); *Hawaii Psychiatric Soc'y v. Ariyoshi*, 481 F. Supp. 1028 (D. Haw. 1979).

[6] Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213 (1890).

civilized men."[7] "To protect that right," Brandeis wrote, "every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[8]

Since *Whalen* and *Nixon*, *The Right to Privacy* article, and the *Olmstead* dissent, scholars and advocates have worked to advance the claim of informational privacy. The academic consensus describes a robust, vital Constitutional right. As Professor Julie E. Cohen has written:

> Informational privacy is an essential building block for the kind of individuality, and the kind of society, that we say we value. Legislating for informational privacy, in turn, requires a different kind of attention to the categories that have dominated the discussion about data privacy protection. Effective data privacy protection must delineate the appropriate boundary between ownership and speech, specify the parameters for effective consent, and impose meaningful procedural and substantive protections on information practices.[9]

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[7] *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[8] *Id.*

[9] Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1435 (2000).

As Professor Pamela Samuelson explains, "In addition, it may be important to realize that our concept of information privacy, and in particular, our understanding of what is appropriate and inappropriate to do with personal information, is evolving over time."[10] Professor Anita Ramasastry stresses privacy's role in freedom: "As our society becomes less private, even with our consent at each step, the sum of all those steps may mean it also becomes less free."[11]

Privacy contributes to personal and social development, as many scholars have described. Professor Jeffrey Rosen states:

> There is also an important case for privacy that has to do with the development of human individuality. . . .
> We are trained in this country to think of all concealment as a form of hypocrisy. But we are beginning to learn how much may be lost in a culture of transparency: the capacity for creativity and eccentricity, for the

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[10] Pamela Samuelson, Privacy As Intellectual Property, 52 STAN. L. REV. 1125, 1170-72 (2000).

[11] Anita Ramasastry, *Tracking Every Move You Make: Can Car Rental Companies Use Technology to Monitor Our Driving? A Connecticut's Court's Ruling Highlights an Important Question*, Findlaw News, Aug, 23, 2005, *available at* http://writ.news.findlaw.com/ramasastry/20050823.html.

> development of self and soul, for understanding, friendship, even love.[12]

Professor Anita Allen has written:

> There is both empirical evidence and normative philosophical argument supporting the proposition that paradigmatic forms of privacy (e.g., seclusion, solitude, confidentiality, secrecy, anonymity) are vital to well-being. It is not simply that people need opportunities for privacy; the point is that their well-being, and the well-being of the liberal way of life, requires that they in fact experience privacy.[13]

Professor Gary T. Marx notes: "We assume, or at least morally expect, that under ordinary circumstances behavior behind closed doors, in darkness and at a distance will be protected from the eavesdropping of third parties."[14]

Professor Jerry Kang, a prominent legal scholar writing on communications, has described several purposes served by informational privacy. First, informational privacy helps individuals avoid the embarrassment that accompanies the disclosure of

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[12] Jeffrey Rosen, *Why Privacy Matters*, WILSON Q., Autumn 2000, at 38.

[13] Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 756 (1999).

[14] Gary T. Marx, Commentary, *At-Home Spying: Privacy Wanes as Technology Gains; Surveillance May be Legal, But is that the Only Standard?*, L.A. Times, May 28, 2002, at 11.

certain personal details. Second, informational privacy helps individuals construct intimacy with others by preserving a body of personal information, which can be selectively shared to communicate trust. Third, informational privacy helps individuals avoid damaging misuses of information that may expose them to unnecessary prejudices. Finally, informational privacy helps to preserve human dignity.[15]

Scholars have also recognized the specific need to impose limits on data collection, that privacy is not simply the limit on the disclosure of personal information. Professor Helen Nissenbaum, a culture and communications scholar, has argued that "strict limits on incursions into the private lives of citizens" constitute a critical check against a potentially overreaching government. According to Nissenbaum:

> The checks and balances that constitute the right to privacy against government, such as limiting surveillance and placing restrictions on access to personal records, function to curtail such evils as government intimidation and totalitarian-style incursions into private life.[16]

Given the specific threats posed to privacy by the emergence of modern information systems,[17] it is also

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[15] Jerry Kang, *Info. Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1212–16, 1260 (1998).

[16] Helen Nissenbaum, PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE 92 (2010).

[17] "So long as databases identify individuals by a universal identifier, such as a name or a government-issued identity

not surprising that experts in computer security have contributed to the formulation of the modern privacy right:

> Privacy is at the very soul of being human. . . . Privacy is the right to autonomy, and it includes the right to be let alone. Privacy encompasses the right to control information about ourselves, including the right to limit access to that information. The right to privacy embraces the right to keep confidence confidential and to share them in private conversation. Most important, the right to privacy means the right to enjoy solitude, intimacy, and anonymity.[18]

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number, records can easily be propagated and merged, and thus they can be employed for secondary purposes to the individual's detriment." Philip E. Agre, *Beyond the Mirror World: Privacy and the Representational Practices of Computing*, *in* TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 29, 53 (Philip E. Agre & Marc Rotenberg eds., 1997). *See also* Jerry Kang, *Cyberspace Privacy: A Primer and Proposal*, 26 HUM. RTS. 3 (1999) ("[P]ersonal data can be used to commit identity theft, in which an impostor creates fake financial accounts, runs up enormous bills, and disappears leaving only a wrecked credit report behind.").

[18] Whitfield Diffie & Susan Landau, PRIVACY ON THE LINE: THE POLITICS OF WIRETAPPING AND ENCRYPTION 126 (1998).

In a seminal article on the future of privacy, computer scientist David Chaum wrote:

> The choice between keeping information in the hands of individuals or of organizations is being made each time any government or business decides to automate another set of transactions. In one direction lies unprecedented scrutiny and control of people's lives, in the other, secure parity between individuals and organizations. The shape of society in the next century may depend on which approach predominates.[19]

Peter G. Neumann, a renowned computer scientist who specializes in computer-related risks, has also argued that "[s]acrificing privacy does not necessarily result in greater security." He warned that "serious inroads to privacy protection . . . may be very difficult to reverse."[20]

The protection of informational privacy remains central to the American experience. U.S. privacy commentator Robert Ellis Smith has said:

> [P]rivacy is vital to our national life. Otherwise our culture is debased, belittled, and perverted.
>
> It is equally crucial to the lives of each one of us. Without privacy, there is no safe haven to know oneself. There is no space for

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[19] David Chaum, *Achieving Electronic* Privacy, SCI. AM., Aug. 1992, at 96.

[20] Peter G. Neumann, *The Big Picture*, COMM. OF THE ACM, Sept. 2004, at 112.

> experimentation, risk-taking, and making mistakes. There is no room for growth. Without privacy there is no introspection; there is only group activity. Without privacy, everyone resembles everyone else. A number will do, everyone resembles everyone else. Without privacy, individuality perishes. Without individuality, there can be no group culture, or at least no group culture with any merit.[21]

The claim of informational privacy is not limited to the decisions and scholarship in the United States. As noted international privacy expert David Flaherty has explained:

> The ultimate protection for the individual is the constitutional entrenchment of rights to privacy and data protection. One can make a strong argument, even in the context of primarily seeking to promote data protection, that having an explicit entrenched constitutional right to personal privacy is a desirable goal in any Western society that has a written constitution and a bill of rights. The purpose of creating a constitutional right to privacy is not to leave data protection solely to the court except for the interpretation of the necessary statutes in statutes cases of conflict, but to allow

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[21] Robert Ellis Smith, OUR VANISHING PRIVACY AND WHAT YOU CAN DO TO PROTECT YOURS 4 (1993), citing *Doe v. Bolton*, 410 U.S. 179 (1973).

> individuals to assert privacy claims that extend beyond the act. . . .
>
> All Western societies require constitutional standing for both data protection and information self-determination in accord with the census decision of the German Federal Constitutional Court. As Simitis has written: "Since this ruling at the latest, it has been an established fact in this country that the Constitution gives the individual the right to decide when and under what circumstances his personal data may be processed."[22]

The right to informational privacy has been broadly adopted in international treaties and declarations. Privacy experts Simon Davies and David Banisar have written:

> Privacy is a fundamental human right recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in many other international and regional treaties. Privacy underpins human dignity and other values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age. . . .
>
> Privacy has roots deep in history. The Bible has numerous references to privacy. There was also substantive protection of

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[22] David H. Flaherty, PROTECTING PRIVACY IN SURVEILLANCE SOCIETIES 376 (1998) (internal citation omitted).

privacy in early Hebrew culture, classical Greece and ancient China.[23]

The right to informational privacy "has spread to virtually every corner of European governance."[24]

B. International Courts Recognize the Right to Informational Privacy

Whalen v. Roe recognized the right to informational privacy as "the individual interest in avoiding disclosure of personal matters."[25] In 1983, the German Constitutional Court recognized the right of "informational self-determination."[26] The *Census* Case held that certain questions on the census survey exceeded the scope of government authority. In ruling for the citizens bringing the complaint, the German Constitutional Court found that the right of personality, already recognized in Articles I and II of the German Constitution, also entails "the right to information self-determination." This right to informational self-determination is two-fold: (1) it "protects the individual from borderless collection, storage, application, and transmission of

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[23] David Banisar & Simon Davies, *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL. J. COMPUTER & INFO. L. 1, 6 (1999).

[24] Francesca Bignami, *The Case for Tolerant Constitutional Patriotism: The Right to Privacy Before the European Courts*, 41 CORNELL INT'L L.J. 211 (2008).

[25] *Whalen*, 429 U.S. at 599.

[26] *In re: Census Act*, 30 BVerfGE 1, 42-43 (Dec. 15, 1983).

personal data" and (2) prevents any processing of personal data that leads to an inspection of or an influence upon a person that is capable of destroying an individual capacity for self-governance."[27] The *Census* case "compels the State to organize data processing so that personal autonomy will be respected."[28]

Whalen and the *Census* Case influenced international privacy jurisprudence, resulting in the widespread recognition of the right to informational privacy. International courts have invoked the right to informational privacy to protect individuals' interests in their personal medical information, as well as employees' interests in refusing to disclose sensitive information to employers.

In 2008, the European Court of Human Rights held that the United Kingdom violated Article 8 of the European Convention for the Protection of Human Rights and Freedoms by failing to safeguard citizens' informational privacy rights in their fingerprints, DNA and cellular samples.[29] Two UK citizens requested destruction of their fingerprints and DNA samples after they were acquitted of criminal charges, but the UK police refused. Police

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[27] Paul Schwartz, *The Computer in German and American Constitutional Law: Toward an American Right of Informational Self-Determination*, 37 AM. J. COMP. L. 675, 690 (1989).

[28] *Id.*

[29] *Case of S. and Marper v. The United Kingdom*, Applications nos. 30462/04 and 30566/04, Eur. Ct. H.R., Dec 4, 2008.

had collected the samples when the citizens were first charged. The court held that "the blanket and indiscriminate nature of the powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences . . . fails to strike a fair balance between competing public and private interests."[30]

Case of S. and Marper followed a 2004 European Court of Human Rights decision barring the Ukraine government from obtaining and disclosing confidential medical information without patients' consent.[31] The government obtained confidential information concerning psychiatric treatment of Mr. Panteleyenko, a citizen who was engaged in a civil lawsuit against the government.[32] This information was subsequently disclosed, without consent, at a public hearing.[33] The European Court of Human Rights found that the Ukraine government violated Mr. Panteleyenko's right to informational privacy by collecting and disclosing personal health information without consent.

In 1999, The Spanish Constitutional Court held that the right to informational privacy bars collection of health-related data absent a specific statutory mandate or individual consent.[34] The Court held that

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[30] *Id.* at ¶ 125.

[31] *Panteleyenko v. Ukraine*, App. No. 11901/02, Eur. Ct. H.R. 43 (2004).

[32] *Id.*

[33] *Id.*

[34] STC 202/1999, of Nov. 8 [Spanish Constitutional Court], cited in Javier Thibault Aranda, *Information Technology*

a database called "absent on medical grounds" was unconstitutional. The database collected the results and diagnoses of employees' regular medical examinations. Some employees did not consent to the use of this data; nor were the records kept for the purpose of preserving the health of employees.

Other international courts have also applied the right to informational privacy to safeguard employment-related information.[35]

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and Workers' Privacy: A Comparative Study: Part II: National Studies: Information Technology and Workers' Privacy: The Spanish Law, 23 COMP. LAB. L. & POL'Y J. 431 (2002).

[35] *E.g.* Joined Cases C-465/00, C-138-01, and C-139/01, *Rechnungshof v. Österreichischer Rundfunk and Others*, 2003 E.C.R. (May 20, 2003), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62000J0465:EN:HTML (holding that "collection of data by name relating to an individual's professional income, with a view to communicat[e] it to third parties," violates the right to informational privacy); *Arroyo v. Rattan Specialties, Inc.*, 117 P.R. Dec. 35 (1986), *cited in* Luis Anibal Aviles Pagan, *Articulo: Human Dignity, Privacy and Personality Rights in the Constitutional Jurisprudence of Germany, the United States and the Commonwealth of Puerto Rico*, 67 Rev. Jur. U.P.R. 343 (1998) (holding that mandatory polygraph tests violate employees' right to informational privacy because "[r]egardless of the degree of reliability that the polygraph test could reach, its intrusion upon the mind of the human being, with his thoughts, is such that he loses the freedom to control the disclosure of his own thoughts"); Case C-28/08 P, *Commission v. Bavarian Lager*, Court of Justice of the European Union, June 29, 2010 (holding that

II. The Privacy Act Would Not Sufficiently Protect Respondents' Information

NASA argues that the "informational privacy interests in this case are limited" because "information gathered in the background-check process is protected by the Privacy Act and other safeguards."[36] Attempting to narrow the scope of the Scientists' privacy interests, NASA ignores data collection and focuses on disclosure, alleging that "the essence of the privacy interest . . . is 'keeping personal facts away from the public eye.'"[37] NASA contends that it may collect sensitive information from the Scientists because the Privacy Act, 5 U.S.C. § 552a, will safeguard the data.[38]

However, the Privacy Act does not adequately protect the Scientists' privacy. The Privacy Act prohibits federal agencies from disclosing personal information in some circumstances. However, NASA has willfully disclosed employees' sensitive health information in the past, and subsequently argued that its disclosures were lawful. NASA has already announced its intent to exempt itself from Privacy Act obligations concerning the Scientists' SF-85 information in this case.

Even if the Scientists' information is ostensibly protected by the Privacy Act, it might be disclosed

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disclosure of the identities of civil servants involved in regulatory investigations would violate their right to informational privacy).

[36] Pet. Br. at 18.

[37] *Id.* at 18, 24.

[38] *Id.* at 18.

through a data breach. The risks of such a disclosure are not, as petitioners claim, a "remote possibility." Instead, the risk of disclosure is substantial: Independent investigators recently highlighted the agency's vulnerability to data breaches.

A. NASA's Narrow Interpretation of "System of Records" Would Not Sufficiently Protect Respondents' Information

NASA has previously disclosed employees' sensitive health information. In *Randall v. NASA*, information about a NASA employee's psychiatric care was placed in a workers' compensation file and later disclosed by a NASA staff doctor at a staff meeting.[39] The employee sued, alleging that NASA violated the Privacy Act by disclosing the data. In its defense, "NASA claimed that Henson had failed to allege that the information divulged came from a record within a system of records."[40]

The Privacy Act states, "No agency shall disclose any record which is contained in a system of records . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . ."[41] Regardless of content, information is only legally protected when it is organized within a "system of records."

"System of records" means "a group of any records under the control of any agency from which

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[39] *Randall v. NASA*, 14 F.3d 1143, 1145 (6th Cir. 1994).

[40] *Id.* at 1146.

[41] 5 U.S.C. § 552a(b) (2010).

information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual . . . ."[42]

In *Randall*, NASA denied that the Privacy Act protected the agency employees' personal health records. NASA argued that the medical documents were not within a "system of records," and thus fell outside the statute's disclosure protections. Whether an organizational system is a "system of records" depends entirely on the method by which information is retrieved, rather than how or what information is stored.[43] In order to qualify as a system of records, information in a database must actually be retrieved by an individual's name or unique identifier. Even if an agency has a group of records from which information *may be* retrieved by name or identifier, courts do not consider such a group of records a "system of records" when the controlling agency "does not *in practice* use its system to retrieve information

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[42] 5 U.S.C. § 552a(a)(5) (2010).

[43] *Savarese v. U.S. Dep't of Health, Education & Welfare*, 479 F. Supp. 304 (N.D. Ga. 1979) (holding that because personal information was "not keyed for retrieval by name or name-related identifiers" and "the only manner of retrieval would be a manual search of the entire file," defendant's disclosure of information about plaintiff was not unlawful under the Privacy Act); *Baker v. Dep't of Navy*, 814 F.2d 1381, 1384 (9th Cir. 1987), *cert. denied*, 484 U.S. 963 (1987) (stating that "the definition of 'system of records' makes coverage under the Act dependent upon the method of retrieval of a record rather than its substantive content").

keyed to individuals."[44] Although some provisions of the Privacy Act apply to "records" in general, most protections, including the protection against unauthorized disclosure, apply only to records maintained in "systems of records." As a result, many records containing sensitive information about individuals fall outside the protections of the Privacy Act.

In *Randall*, the district court agreed with NASA, dismissing the employee's claim. But the Sixth Circuit overruled.[45] Although NASA ultimately lost, this case demonstrates the agency's willingness to use a narrow interpretation of the Privacy Act's "system of records" definition to attempt to evade liability. Furthermore, the district court's decision agreeing with NASA highlights the specious nature of the agency's claim that the Privacy Act protects the Scientists' personal information.

Nearly from its inception, narrow interpretations of the Privacy Act's "system of records" definition have been criticized. The Privacy Protection Study Commission ("PPSC") issued a report on the Privacy Act in 1977.[46] This report concluded that, while the Privacy Act was a great step forward, narrow

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[44] *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1456 (D.C. Cir. 1996) (emphasis added); *see also Artz v. U. S.*, 275 F. App'x 569 (8th Cir. 2008) (holding that because records were retrieved by date, they did not come from a "system of records").

[45] *Id.* at 1149.

[46] U.S. Privacy Protection Study Comm'n, *Personal Privacy in an Information Society* (1977).

interpretations of "systems of records" were problematic.[47] The PPSC determined that narrowly construing "system of records" "undermines the Act's objective of allowing an individual to have access to the records an agency maintains about him, and . . . unnecessarily limits the Act's scope."[48]

Concern over agencies' narrow implementation of the Privacy Act has only grown since 1977. Because modern computer databases allow for retrieval of "records" by any number of means, commentators have argued for Congressional action to clarify the definition of a "system of records" to reflect these changes in technology.[49] Whereas the functionality of older databases provided few retrieval methods, modern databases allow for retrieval by any number of fields. For example, it would be trivial to retrieve a set of all records in which a Scientist answered "yes" to SF-85's drug use question. Under NASA's narrow interpretation of "system of records," the Privacy Act would not protect records retrieved by this method, since the agency's search was not "keyed for retrieval by name or name-related identifiers."[50]

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[47] *Id.*

[48] *Id.*

[49] Julianne M. Sullivan, Comment, *Will The Privacy Act of 1974 Still Hold up in 2004? How Advancing Technology Has Created a Need for Change in the "System Of Records" Analysis*, 39 CAL. W.L. REV. 395 (2004).

[50] *Savarese*, 479 F. Supp. at 304.

B. The Privacy Act Includes Broad Exceptions that Permit Disclosure of Sensitive Documents by NASA

There are twelve exceptions to the Privacy Act's general prohibition against disclosure, some of which are extraordinarily broad.[51] If an agency determines that disclosure is permitted by an exception, it merely needs to keep an accounting of the date, nature, and purpose of the disclosure as well as the name and address of the person or agency to whom the disclosure is made.[52]

As a result of these exceptions, a record covered by the Privacy Act is not necessarily protected; Information can flow quite freely within, between, and outside agencies. For example, the PPSC noted that in the law enforcement context, "[t]he Privacy Act does not place an effective burden on, or barriers to, the free flow of information within the law enforcement and investigative community."[53]

There is substantial risk that NASA would disclose the Scientists' personal information pursuant to the "routine use" exception. This exception allows agencies to disclose records for any purpose "compatible" with the purpose for which the record was originally collected, as long as the agency publishes the routine use in the Federal Register.[54] Agencies have unlawfully used the "routine use"

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[51] 5 U.S.C. § 552a(b)(1-12) (2010).

[52] 5 U.S.C. § 552a(c)(1) (2010).

[53] PPSC, *supra* note 46 at 516–21.

[54] 5 U.S.C. § 552a(b)(3) (2010).

exception as a purported basis for disclosing employees' sensitive information.[55]

It is important to note that agencies define their own routine uses. This gives agencies the opportunity to essentially create their own new exceptions to the Privacy Act's disclosure prohibition.

Moreover, NASA has breached its statutory obligations regarding routine uses and SF-85 as well as Form 42. The Privacy Act requires agencies to "publish in the Federal Register . . . each routine use of the records contained in the system, including the categories of users and the purpose of such use."[56] Agencies must also "inform each individual whom it asks to supply information, on the form which it uses to collect the information . . . the routine uses which may be made of the information."[57] However, the routine uses published in the Federal Register concerning SF-85 are not identical to the routine uses listed on the SF-85 form itself.[58] Worse, Form 42 lists

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[55] *E.g. Covert v. Herrington*, 876 F.2d 751, 752-56 (9th Cir. 1989) (Holding that the Department of Energy violated the Privacy Act when it disclosed employees' responses to a security clearance questionnaire. The DOE unsuccessfully argued that the disclosure was lawful pursuant to the "routine use" exception.).

[56] 5 U.S.C. § 552a(e)(4) (2010).

[57] *Id.*

[58] *See e.g., Privacy Act of 1974: Privacy Act System of Records*, 74 Fed. Reg. 50,247, 50,251-53 (Sept. 30, 2009); *see also* Office of Pers. Mgmt., *Questionnaire for Non-Sensitive Positions* (SF-85), J.A. 88-95.

no routine uses at all.[59] By failing to adequately "inform each individual whom it asks to supply information" about its routine uses, petitioner undermines its own assertion that the Privacy Act provides meaningful privacy protection.

Several of NASA's listed routine uses demonstrate that the Privacy Act does not, in practice, sufficiently protect the Scientists' privacy. On SF-85, the sixth routine use permits disclosure to contractors, grantees, experts, consultants, or volunteers when necessary to perform a function or service related to the record for which they have been engaged.[60] This creates the risk that personal information about the Scientists' drug counseling will be sent outside NASA, and potentially outside the government altogether. The fourth enumerated routine use listed on SF-85 allows disclosure to any source from which information is requested in the course of an investigation concerning the hiring or retention of an employee or other personnel action to the extent necessary to identify the individual, inform the source of the nature and purpose of the investigation, and to identify the type of information requested.[61] This raises the specter that personal information will be inadvertently disclosed to individuals listed as references by the Scientists.

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[59] INV Form 42, *Investigative Request for Personal Information*, J.A. 96-97.

[60] J.A. 89.

[61] *Id.*

C. The Privacy Act Does Not Protect Respondents' Information Against NASA's Data Breaches

If NASA is permitted to collect the Scientists' personal health information, there is a substantial risk that the data will be disclosed as a result of a data breach. Even the most rigorous statutory protections are no guarantee against exposure of personal information in data breaches. A June 2007 report (the "Data Breach Report") published by the United States Government Accountability Office ("GAO") describes the frequency and breadth of such breaches.[62] "While comprehensive data do not exist, available evidence suggests that breaches of sensitive personal information have occurred frequently and under widely varying circumstances."[63] Over 570 data breaches were reported in the media from January 2005 through December 2006.[64] A survey of federal agencies "identified more than 788 data breaches at 17 agencies from January 2003 to July 2006 . . . . Most of these breaches have compromised data that included personally identifiable information . . . ."[65] The breaches "varied in size—for example, several affected fewer than five records,

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[62] U.S. Gov't Accountability Office, *Data Breaches are Frequent, but Evidence of Resulting Identity Theft is Limited; However, the Full Extent is Unknown* (2007).

[63] *Id.* at 5.

[64] *Id.*

[65] *Id.*

while a breach at a VA affected 26.5 million records."[66]

NASA is Particularly at Risk

NASA has been singled out for criticism concerning its network and data security practices. In October 2009, the GAO released a report titled *NASA Needs to Remedy Vulnerabilities in Key Networks* (the "NASA Report").[67] The NASA Report reviewed and criticized NASA's data security practices at several of NASA's centers, including the Jet Propulsion Laboratory ("JPL").[68] "NASA did not consistently implement effective controls to prevent, limit, and detect unauthorized access to its networks and systems."[69] In particular, NASA did not implement sufficient access controls,[70] it did not keep

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[66] *Id.*

[67] U.S. Gov't Accountability Office, *NASA Needs to Remedy Vulnerabilities in Key Networks* (2009).

[68] *Id.* at 2.

[69] *Id.* at unpaginated "Highlights" section.

[70] "NASA did not adequately identify and authenticate users in systems and networks supporting mission directorates." *Id.* at 14. None of the NASA centers reviewed "sufficiently restrict[ed] access and privileges to only those users that needed access to perform their assigned duties." *Id.* at 15. "Although NASA has implemented cryptography, it was not always sufficient or used in transmitting sensitive information." *Id.* at 16. NASA "did not always adequately control the logical and physical boundaries protecting its information and systems." *Id.* "[F]irewalls at the centers did not provide adequate protection for the organization's networks, since they could be bypassed." *Id.* at 17. NASA "neither enforced

its software or system configurations up-to-date,[71] and it had not sufficiently implemented its information security program[72] as required by the Federal Information Security Management Act ("FISMA").[73] Because of NASA's vulnerabilities and shortfalls, "increased and *unnecessary risk exists*

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stringent physical access measures . . . nor did it maintain and review . . . a current list of personnel with access to all IT-intensive facilities and properly authenticate visitors to these facilities." *Id.* at 18. Moreover, "NASA did not adequately segregate incompatible duties," which "increases the risk that erroneous or fraudulent transactions could be processed . . . ." *Id.* at 17-18.

[71] "For example, all three NASA centers had not applied a critical operating system patch, . . . increasing the risk of exposing critical and sensitive unclassified data to unauthorized access." *Id.* at 20. Furthermore, NASA's e-mail systems were "vulnerable to attack because their systems allowed various file types as extensions," creating an "increased risk . . . that an attacker could . . . execute malicious code and gain control of or compromise a system." *Id.*

[72] "NASA had not fully assessed its risks." *Id.* at 23. "The agency did not have a policy for malware incident handling and prevention." *Id.* at 24. "NASA's policies do not adequately describe physical access controls . . . ." *Id.* "NASA had developed contingency plans for the five systems and networks we reviewed. However, shortcomings existed in several plans." *Id.* at 27. "Although NASA regularly monitored its unclassified network for security vulnerabilities, the monitoring was not always comprehensive." *Id.* at 17.

[73] FISMA was enacted as title III, E-Government Act of 2002, Pub. L. No. 107-347 (Dec. 17, 2002).

that sensitive information is subject to unauthorized disclosure, modification, and destruction . . . ."[74] The NASA Report made eight recommendations; NASA ultimately failed to dispute the report's conclusions.[75] Indeed, "NASA recognizes there are still significant gaps" in its technology security posture.[76]

The NASA Report details actual attacks leveled against the agency. "During fiscal years 2007 and 2008, NASA reported 1,120 security incidents . . . ."[77] This includes 839 "malicious code attacks," the "highest experienced by any of the federal agencies . . . account[ing] for over one-quarter of the total number of malicious code attacks directed at federal agencies during this period."[78] Over the same period of time, "NASA reported 209 incidents of unauthorized access" to sensitive data.[79] For at least one such breach, the "incident report does not indicate whether this lost data was unencrypted or encrypted or how the incident was resolved."[80]

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[74] U.S. Gov't Accountability Office, *supra* note 67, at unpaginated "Highlights" section (emphasis added).

[75] *Id.* app. VI at 44-47 (Letter from Lori B. Garver, Deputy Administrator of NASA, to Gregory C. Wilshusen, Director, Information Security Issues, U.S. Gov't Accountability Office (Oct. 9, 2009)).

[76] *Id.* app. VI at 44.

[77] *Id.* at 32.

[78] *Id.* at 33.

[79] *Id.*

[80] *Id.* at 33.

The NASA Report was particularly critical of NASA's contract with JPL. Although the contract "specified adherence to certain NASA security policies, it did not require [JPL] to implement key elements of an information security program."[81] In addition, NASA failed to "incorporate provisions in the contract to allow it to perform effective oversight of [JPL]'s implementation of the security controls and program."[82] As a result, "NASA faces a range of risks from contractors and other users with privileged access to NASA's systems, applications, and data since contractors . . . can introduce risks to their information and information systems."[83]

The dramatic flaws in NASA's data storage networks place the Scientists' data at substantial risk. The risk of a data breach at NASA fatally undermines the agency's asserted distinction between collection and disclosure. NASA argues that "this case presents no realistic threat of public disclosure of information that comes into the

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[81] *Id.* at 30-31. The NASA Report listed four FISMA and NASA requirements not met by the JPL contract: (1) "periodic testing and evaluation of the effectiveness of information security policies"; (2) a "process for planning, implementing, evaluating, and documenting remedial actions to address any deficiencies in the information security policies"; (3) "[p]rocedures for detecting, reporting, and responding to security incidents"; and (4) "[p]lans and procedures to ensure continuity of operations for information systems that support the operations and assets of the agency."

[82] *Id.* at 31.

[83] *Id.*

government's possession."[84] Because there are "numerous statutory and regulatory protections for information obtained through the background-check process," NASA claims that its background-check program does not "implicate[] the principal concern for the privacy of personal information."[85] Even assuming, *arguendo*, that such statutory protections are meaningful in this case, the well-documented, ubiquitous, imminent threat of data breaches demonstrates that NASA's data collection does "implicate[] the principal concern for the privacy of [the Scientists'] personal information." The only way that NASA can in good faith assure the Scientists that their information will not be disclosed is not to collect it in the first place.

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[84] Pet. Br. at 27.

[85] *Id.* at 30.

CONCLUSION

Amici respectfully ask this Court to deny Petitioners' motion and uphold the decision of the lower court.

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AMICUS CURIAE BRIEF

No. 09-530

IN THE
Supreme Court of the United States

NATIONAL AERONAUTICS
AND SPACE ADMINISTRATION, ET AL.,

Petitioners

v.

ROBERT M. NELSON, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* UNION OF CONCERNED SCIENTISTS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF AMICUS CURIAE 1

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE GOVERNMENT DOES NOT HAVE THE BROAD AUTHORITY OF AN EMPLOYER TO INVADE THE CONSTITUONALLY PROTECTED PRIVACY OF CALTECH SCIENTISTS. 6

A. Federal Regulations Protect the Independence of Caltech Scientists 6

B. The Government's Argument is Inconsistent with Longstanding Federal Policy of Protecting the Independence of Research at FFRDCs 8

C. Caltech's Contract with NASA Protects its Independence 12

II. THE GOVERNMENT'S PROPRIETARY INTEREST IN JPL DOES NOT MAKE IT THE EQUIVALENT OF THE CALTECH SCIENTISTS' EMPLOYER 14

A. The Government's Proprietary Interest in JPL Facilities and Resources Does Not Give it the Power of an Employer Over the Caltech Scientists 14

B. The Government's Creation of an Exception for Certain Caltech Faculty Members

Undermines its Claim That Broad Application of the NACI Background Investigation is Necessary to Protect its Proprietary Interest in the JPL Facilities 17

III. THE COURT SHOULD AVOID SETTING A PRECEDENT THAT WOULD DEGRADE THE INDEPENDENCE AND THEREBY DIMINISH THE QUALITY OF WORK BY ACADEMIC AND RESEARCH INSTITUTIONS ASSOCIATED WITH FFRDCS 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES:

Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961).....14, 16

Engquist v. Oregon Dep't of Agric., 128 S.Ct. 2146 (2008).....4, 6, 14

Dent v. West Virginia, 129 U.S. 114 (1889)..... 16

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 16

Truax v. Raich, 239 U.S. 33 (1915) 16

Waters v. Churchill, 511 U.S. 661 (1994) 6

STATUTES:

National Science Foundation Act of 1950, 64 Stat. 149 (1950) 42 U.S.C. §§ 1861-1887 (2010) 10

RULES:

U.S. Supreme Court Rule 36.7 1

REGULATIONS:

48 C.F.R. § 35.017(a)(2) 15

48 C.F.R. § 35.017(a)(3) 7

FEDERAL REGISTER NOTICES

Issuance of Policy Letter No. 84-1, "Federally Funded Research and Development Centers (FFRDCs)", 49 Fed. Reg. 14,462 (April 11, 1984)..... 11, 12

55 Fed. Reg. 3885 (February 5, 1990) 12

MISCELLANEOUS:

Bush, Vannevar, *Science, the endless frontier: A report to the President by Vannevar Bush, director of the Office of scientific research and development* July 1945) 8, 9, 19-20

Bureau of the Budget, *Report to the President on Government Contracting for Research and Development*, S. Doc. No. 94 (2d Sess. 1962)..... 11

"NASA Facts" 8

NASA Procedural Requirements: NPR 1600.1 (2005) 3, 18

National Science Foundation List of FFRDCS..... 7

INTERESTS OF AMICUS CURIAE[1]

The Union of Concerned Scientists ("UCS"), an alliance of more than 300,000 citizens and scientists, is the leading U.S. non-profit organization dedicated to the use of science to foster a healthy environment and a safer world. UCS combines independent scientific research and citizen action to develop innovative and practical solutions to pressing environmental and security problems and to secure responsible changes in government policy, corporate practices, and consumer choices.

UCS believes this case has significant implications with respect to the vigor and independence of government-sponsored scientific research at Federally Funded Research and Development Centers ("FFRDCs"), which play a significant role in scientific research and technological advancement in the U.S. The government's position in this case is inconsistent with long-established federal policies and procurement regulations designed to ensure the independence of federally funded scientific research at FFRDCs by requiring that it will be carried out by autonomous universities, research institutions and private corporations under contract with the federal government. In this case, for instance, California Institute of Technology ("Caltech") scientists conduct research at the Jet Propulsion Laboratory ("JPL")

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[1] Pursuant to Rule 37.6 of this Court, UCS states that this brief was not written in whole or in part by counsel for a party and that no one other than UCS made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of the brief are on file with the Clerk.

under a contract between Caltech and the National Aeronautics and Space Administration ("NASA").

By proposing that this Court should treat Caltech employees working at JPL as federal government employees for purposes of evaluating the constitutionality of background investigations of the Caltech employees, the government contradicts and undermines its own long-established policy of maintaining an arms-length contractual relationship with independent academic and research institutions that do scientific research for the government at FFRDCs.

UCS is concerned that if Caltech and other universities are no longer seen as independent research institutions but rather as extensions of the federal government, then they will not be able to attract or retain highly talented scientists who seek an independent academic environment. As a result, the quality of scientific research conducted at FFRDCs is likely to suffer, adversely affecting the vitality and quality of the scientific enterprise in the U.S. as a whole.

STATEMENT OF FACTS

In 2005, NASA changed its longstanding procedures to require that employees of NASA contractors must undergo the same National Agency Check with Inquiries ("NACI") background investigation that the government has traditionally used for federal civil service employees. NASA Procedural Requirements: NPR 1600.1; J.A. 151. In 2007, over Caltech's objection, NASA unilaterally modified its contract with Caltech to apply these procedures to all Caltech employees working at JPL. Pet. App. 5a; J.A. 225; J.A. 157-162. Caltech subsequently adopted a policy that scientists refusing to undergo the background investigation would be considered to have voluntarily resigned from Caltech. Pet. App. 6a. The new policy was imposed as part of a post-9/11 effort to heighten security at federal facilities. Pet. Br. 8.

The government imposed the NACI background investigation requirement on the Caltech scientists working at JPL, despite the fact that the vast majority of these scientists work on unclassified "non-sensitive" and "low-risk" subjects, and all had previously undergone standard criminal background checks and employment reference checks in order to work for Caltech. Pet. App. 79a; C.A. App. at 1397.

As part of the background investigation, Caltech scientists working at JPL must allow federal investigators to question any person about a broad range of issues related to their public and private lives such as their "general behavior or conduct" or "other matters." Pet. App. 5a. The government has not denied that the inquiries may cover the scientist's sex lives and whether they had received drug counseling. *Id.*

In *Nelson v. NASA*, 530 F.3d 865 (9th Cir. 2008), the U.S. Court of Appeals found it likely that the appellants would prevail on their claim that the background investigation's "vague solicitation of derogatory information" constituted an unwarranted invasion of the Caltech scientists' constitutional privacy rights. Pet. App. 1a-29a. The court reversed the District Court's denial of a preliminary injunction against the imposition of the investigations and remanded the case to the District Court. *Id.* 29a. The court denied rehearing en banc in *Nelson v. NASA*, 568 F.3d 1028 (9th Cir. 2009); Pet. App. 75a-130a.

SUMMARY OF ARGUMENT

The government claims this case raises no constitutional privacy issue because it is entitled, as an "employer and a proprietor of federally owned facilities and information systems," to conduct background investigations for purposes of determining whether the Caltech scientists should have long-term access to JPL and its resources. Pet. Br. 33 (citing *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 128 S.Ct. 2146, 2152 (2008)). But the government's invocation of its plenary powers as an employer and proprietor is inappropriate in this case. As a matter of federal regulation, longstanding government policy, and the terms of NASA's contract with Caltech, only Caltech is the scientists' employer.

The same regulations and policies which prevent the government from asserting the unbounded authority of an employer over the Caltech scientists also circumscribe its authority as proprietor of JPL. These regulations and policies require the government to maintain a balance between its interest in protecting its facilities and its interest in obtaining

the type of high quality research that is available from an independent institution. Historically, the government has maintained that balance by tailoring its security requirements to the type of access sought. The government's purported "proprietary" interest in JPL does not give it free rein to override that long-established balance. Moreover, the fact that NASA has made a special exception to the background investigation requirements for certain faculty members working at JPL demonstrates that it is capable of protecting its proprietary interest in the security of the JPL site without imposing blanket intrusions on personal privacy.

By asking the Court to find that NASA has unfettered authority over the Caltech scientists as their employer or as proprietor of JPL, the government is asking the Court to set a significant legal precedent that would contradict and undermine its own previously established policy of protecting the independence of academic and research institutions which manage FFRDCs. UCS believes that such a decision would reduce the attractiveness of those institutions to talented scientists, thereby diminishing the vitality and quality of the research at these institutions and the value of the institutions' contributions to the U.S. scientific enterprise as a whole.

ARGUMENT

I. THE GOVERNMENT DOES NOT HAVE THE BROAD AUTHORITY OF AN EMPLOYER TO INVADE THE CONSTITUONALLY PROTECTED PRIVACY OF CALTECH SCIENTISTS.

In seeking to justify the constitutionality of its far-ranging background investigations into the personal lives of Caltech scientists, the government characterizes itself as an "employer" collecting "employment-related information." *See, e.g.*, Pet. Br. 2, 17, 18, 19-21, 26. In its capacity as an employer, the government claims to have "far broader" constitutional powers than it would have as a "sovereign" attempting to regulate the lives of private individuals. Pet. Br. 33 (citing *Engquist v. Oregon Dep't of Agric.*, 128 S.Ct. 2146, 2152 (2008) (quoting *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)).

The government is wrong. Consistent with federal regulation, longstanding government policy, and the terms of NASA's contract with Caltech, the federal government is *not* an employer in these circumstances. Only Caltech is the employer of the Caltech scientists for whom the government wants to require its own background investigations. Thus the government is not entitled to claim any constitutional authority beyond its ordinary powers as a sovereign.

A. Federal Regulations Protect the Independence of Caltech Scientists.

JPL is one of thirty-nine institutions referred to as Federally Funded Research and Development Centers or "FFRDCs." These unique institutions are established for the purpose of providing government

funding and support for scientific research that is independent of direct government control. FFRDCs use research facilities owned by the federal government, but they are managed by universities, research institutions, and private corporations under government contracts. Federal procurement regulations provide that an FFRDC is not managed by the federal government, but must be run by an "autonomous organization or as an identifiable separate operating unit of a parent organization." 48 C.F.R. § 35.017(a)(3). Thus at JPL, scientists employed by Caltech conduct research under a contract between NASA and Caltech.[2]

The basic structure of an FFRDC, as established under 48 C.F.R. § 35.017(a)(3), therefore prevents the government from having a direct employment relationship with the Caltech scientists who work at JPL. The government may negotiate contract terms with Caltech, but its relationship is solely with that "autonomous organization," not with the scientists who work for Caltech. Only Caltech is the employer

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[2] The other thirty-eight FFRDCs in the United States include, for example, Brookhaven National Laboratory (which operates under a contract between the U.S. Department of Energy and Brookhaven Science Associates, L.L.C); the National Astronomy and Ionosphere Center (which operates under a contract between the National Science Foundation and Cornell University); and the Studies and Analyses Center (which operates under a contract between the Department of Defense and the Institute for Defense Analyses). The National Science Foundation, maintains a list of all FFRDCs and publishes basic information about them and their relationships with their sponsoring agencies on its website at: http://www.nsf.gov/statistics/ffrdclist/admin.cfm (last visited July 16, 2010).

of the Caltech scientists who work at JPL. Accordingly, the government's claim to have the powers and interests of an employer vis-à-vis the Caltech scientists is inconsistent with the basic structure of an FFRDC as defined in the governing regulations.

B. The Government's Argument is Inconsistent with Longstanding Federal Policy of Protecting the Independence of Research at FFRDCs.

Longstanding federal policy also contradicts the position taken by the government in this case that it should be treated as the employer of Caltech scientists and therefore entitled to determine their suitability for employment. That federal policy was established in reaction to the government's experience during World War II, when vast amounts of federal funding were poured into U.S. academic institutions for the development of the atomic bomb and other military purposes.[3] As set forth in *Science: the Endless Frontier*, the influential report to Franklin D. Roosevelt by presidential advisor Vannevar Bush:

> The Government is peculiarly fitted to perform certain functions, such as the coordination and support of broad programs on problems of great national importance. But we must proceed with caution in carrying over the methods which work in wartime to the very different conditions of peace. We must remove the rigid controls

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[3] JPL, for example, began as a Caltech-run military research center that was transferred to NASA in 1958. "NASA Facts," published on NASA's website at: http://www.jpl.nasa/gov/news/fact_sheets/jpl.pdf (last visited on August 5, 2010).

> which we have had to impose, and recover freedom of inquiry and that healthy competitive scientific spirit so necessary for expansion on the frontiers of scientific knowledge.

Vannevar Bush, *Science: The Endless Frontier: a report to the President by Vannevar Bush, director of the Office of Scientific Research and Development* 7 (U.S. G.P.O. 1945).

In response to President Roosevelt's request for recommendations on how the federal government should continue its support of both public and private scientific research after the war, Bush proposed as a principle of "utmost importance" that the "internal control of policy, personnel, and the method and scope of the research" to be performed in colleges, universities and research institutions should be left to the institutions themselves. *Id.* at 27.

Bush also proposed four other principles for government sponsorship of scientific research: that the government should commit to stable and long-term funding of research projects, that it should promote research through grants and contracts rather than government-owned laboratories, that government agencies should be composed of individuals with a broad base of experience and interest in scientific research, and that government agencies should be accountable to Congress and the President for their decisions. Bush recommended the establishment of a new agency to oversee and promote government sponsorship of scientific research. *Id.* at 28-34.

Five years later, consistent with Bush's recommendation, Congress created the National Science Foundation ("NSF") to encourage scientific research and development in the public and private sectors.

National Science Foundation Act of 1950, ch. 171. § 3, 64 Stat. 149 (1950) (codified as amended at 42 U.S.C. §§ 1861-1887 (2010)). The Act provided that one of the functions of NSF would be "to strengthen basic research and education in the sciences, including independent research by individuals, throughout the United States, including its Territories and possessions, and to avoid undue concentration of such research and education." *National Science Foundation Act of 1950* § 3(b) (current version at 42 U.S.C. § 1862(e)). When making contracts or otherwise using available appropriations, Congress also instructed the NSF to focus on the following objectives:

> (1) having the work performed by organizations, agencies, and institutions, or individuals in the United States or foreign countries, including Government agencies of the United States and of foreign countries, qualified by training and experience to achieve the results desired, (2) strengthening the research staff of organizations, particularly nonprofit organizations, in the States, Territories, possessions, and the District of Columbia, (3) aiding institutions, agencies, or organizations which, if aided, will advance basic research, and (4) encouraging independent basic research by individuals.

National Science Foundation Act of 1950 § 14(g) (current version at 42 U.S.C. § 1873(e)). Thus, the Act signaled a Congressional policy of encouraging the strength and independence of researchers and research institutions.

The decades following World War II marked a rapid increase in the amount of federal funding for scientific research, leading President John F. Ken-

nedy to request a study by the Bureau of the Budget. The resulting report expressed significant concern that the government was unable to hire and retain top scientists because of restrictions on the levels of compensation that could be paid to civil service employees. Bureau of the Budget, *Report to the President on Government Contracting for Research and Development*, S. Doc. No. 94 at viii (2d Sess. 1962). The report noted that pay restrictions affect not just the government's access to scientists, but also its access to capable managers for their research and development programs. *Id.* at 9. By turning to universities and other public or private institutions, the government could access the high-quality scientists and managers it was unable to retain on a government salary. Use of non-governmental researchers also would give the government access to the "unique intellectual environment" that results from the combination of graduate education and research. Such research, the report noted, "is not amenable to management control by adherence to firm schedules, well-defined objectives, or predetermined methods of work." *Id.* at 11.

In 1984, recognizing the need to establish a "single policy applicable to all types of FFRDCs," the Office of Federal Procurement Policy issued a policy letter regarding the establishment of Federal Acquisition Regulations for FFRDCs. Issuance of Policy Letter No. 84-1, "Federally Funded Research and Development Centers (FFRDCs), 49 Fed. Reg. 14,462 (April 11, 1984). The Policy Letter included a definition of FFRDCs specifying that their activity is "operated, managed and/or administered by either a university or consortium of universities, other nonprofit organization or industrial firm as an autono-

mous organization or as an identifiable separate operating unit of a parent organization." 49 Fed. Reg. at 14,481. In 1990, this definition of an FFRDC was codified at 48 C.F.R. § 35.017(a)(3). 55 Fed. Reg. 3885 (February 5, 1990).

In sum, since World War II, both Congress and the Executive Branch of the U.S. government have pursued a policy of setting up frameworks such as the FFRDCs that recognize and value the independence of scientific research institutions from the government agencies that fund or contract with them. The government's claim that Caltech scientists are no different from government employees is inconsistent with and contradicted by this policy.

C. Caltech's Contract with NASA Protects its Independence.

Caltech's contract with NASA for the operation of JPL also shows that respondents are Caltech scientists, subject to Caltech's autonomous management and independent from the federal government. The contract requires Caltech to "provide, either directly or through subcontract, the management, scientific, engineering, technical and other personnel, labor and services necessary to perform all work required" under the contract. Part I, Section C-2, par. (a); C.A. App. at 1054. Caltech is responsible for management controls and payment of wages. *Id.*, Sections H-4 and H-6; C.A. App. at 1088, 1089-90. The contract lists only two types of "key" positions for which Caltech must obtain NASA's approval before removing, replacing or diverting personnel: Directors and Project Managers and Project Scientists who are assigned full time to perform for a "flight project." *Id.*, Section H-3; C.A. App. at 1088.

The contract's Appendix 1, "NASA and Caltech Understanding Concerning the NASA Jet Propulsion Laboratory" also recognizes the "dual character" of JPL: "it is a NASA-owned facility in Pasadena, California, as well as an operating division of Caltech staffed with regular Caltech employees." *Id.* at 2; J.A 164. NASA's understanding of its role is further described as follows:

> NASA recognizes the special character of JPL within the NASA family and the desirability of maximizing the benefits which this university-related FFRDC can bring to NASA. In carrying out its mission JPL will adopt programmatic management policies and practices compatible with those elsewhere in the Agency and will strive to achieve the highest levels of performance, safety and cost effectiveness. *While recognizing the importance of its interface with NASA, the Laboratory will conduct its business, administrative, and personnel affairs in a manner consistent with its role as an operating division of Caltech, and will seek to adopt the best business practices available. NASA will consider JPL's FFRDC status as a university managed FFRDC and other factors to ensure that Government policies to be applied to JPL are appropriate.*

Id. at 4; J.A. 169 (emphasis added). Thus, consistent with federal procurement regulations and government policies dating back to World War II, the contract between NASA and Caltech keeps the government at arms-length from Caltech and its employees.

II. THE GOVERNMENT'S PROPRIETARY INTEREST IN JPL DOES NOT MAKE IT THE EQUIVALENT OF THE CALTECH SCIENTISTS' EMPLOYER.

A. The Government's Proprietary Interest in JPL Facilities and Resources Does Not Give it the Power of an Employer Over the Caltech Scientists.

The government also claims that as the "proprietor of federally owned facilities and information systems," it has power to "manage [its] internal operation" that is equivalent to the power of the federal government over its employees. Pet. Br. 33 (quoting *Engquist,* 128 S.Ct. at 2151 (quoting *Cafeteria & Restaurant Workers Union Local 473 v. McElroy,* 367 U.S. 886, 896 (1961) (brackets in original)). But the fact that the government owns the facilities and resources used by the Caltech scientists at JPL does not make it the equivalent of the Caltech scientist' employer. *Engquist,* which concerned a constitutional claim by a federal government employee against her employer, does not hold otherwise. In that case, the Court addressed the government's role as employer and had no reason to address the rights of a government proprietor independent of its rights as an employer.

Cafeteria & Restaurant Workers Union Local 473 is also inapposite because it concerned the proprietary power of the Navy to regulate the conduct of a government contractor employee, *i.e.,* a cook in a privately run restaurant, on the site of a gun manufacturing facility where the government had "traditionally exercised unfettered control" in its military capacity. 367 U.S. at 896. Here, in contrast, the gov-

ernment has traditionally limited its own control of JPL and other FFRDCs through the promulgation of federal procurement regulations, the establishment of federal policy favoring the independence of non-governmental entities that operate FFRDCs, and the terms of Caltech's contract, which respect that independence. Rather than asserting unfettered control over Caltech, the government has struck a delicate balance that gives it the benefit of independent research by Caltech scientists in exchange for giving those scientists financial support and access to resources. As set forth in the federal procurement regulations governing FFRDCs:

> An FFRDC meets some special long-term research or development need which cannot be met as effectively by existing in-house or contractor resources. FFRDCs enable agencies to use private sector resources to accomplish tasks that are integral to the mission and operation of the sponsoring agency. An FFRDC, in order to discharge its responsibilities to the sponsoring agency, has access, beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to employees and installations equipment and real property. The FFRDC is required to conduct its business in a manner befitting its special relationship with the Government, to operate in the public interest with objectivity and independence, to be free from organizational conflicts of interest, and to have full disclosure of its affairs to the sponsoring agency.

48 C.F.R. § 35.017(a)(2). Historically, the government has maintained the balance between Caltech's

independence and its access to government resources by tailoring any access restrictions to the sensitivity of the information being accessed by the individual. The majority of individuals, who worked on non-sensitive and low-security issues (J.A. 75), underwent standard criminal background checks and employment reference checks. Pet. App. 79a; *e.g.*, J.A. 197. A smaller number of individuals, who worked with classified information or held positions of "public trust" complied with more rigorous security requirements. J.A. 124, 191, 197. In *Cafeteria & Restaurant Workers Union Local 473,* the Navy had no such history or legal framework for balancing the Navy's proprietary interests against the interests of employees of private contractors on the site. Therefore that decision does not support the government's argument.[4]

As the Ninth Circuit recognized in *Nelson,* the government has legitimate interests in "verifying its contractors' identities to make sure they are who they say they are" and in "ensuring the security of the JPL facility so as not to jeopardize the costly investments housed therein." 530 F.3d at 880. But

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[4] In addition, in *Cafeteria & Restaurant Workers Union Local 473,* the Court found that the private interest that was adversely affected by the Navy's security clearance denial was insignificant because it amounted only to the denial of the opportunity to work as a cook at "one isolated and specific military installation," not the right to follow a "chosen trade or profession." 367 U.S. at 895-96 (quoting *Dent v. West Virginia,* 129 U.S. 114 (1889); *Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957); *Truax v. Raich,* 239 U.S. 33 (1915)). Here, in contrast, the government's actions threaten unique and highly technical scientific careers developed over twenty years in some cases. *See, e.g.,* J.A. 187-93; J.A. 194-99.

NASA's legitimate proprietary interest does not translate into unlimited authority to significantly alter the longstanding balance between Caltech's independence and its access to government resources by requiring virtually all Caltech employees working at JPL to undergo a full NACI background investigation, regardless of any individual's degree of access to the facility or its information. Instead, it is appropriate to inquire, as the Ninth Circuit did in *Nelson,* whether the government could show that its background investigation was "narrowly tailored" to meet its interests. *Id.* Because the government could not make the constitutionally required showing, the Ninth Circuit appropriately found that issuance of a preliminary injunction was warranted.

B. The Government's Creation of an Exception for Certain Caltech Faculty Members Undermine its Claim That Broad Application of the NACI Background Investigation is Necessary to Protect its Proprietary Interest in the JPL Facilities.

The government repeatedly asserts that its proprietary interest in protecting the JPL facilities and information systems justifies the broad application of the NACI background investigation. Pet. Br. 34, 35, 36. According to the government:

> It is particularly important for the government to conduct background checks at key federal research facilities like JPL. JPL is one of the Nation's premier space and robotics research and development facilities, and it is staffed exclusively with contract employees. . . . Its annual operating budget is over $1.5 billion, representing a significant investment by American tax-

> payers. . . . The government may legitimately conduct background investigations of individuals with access to JPL facilities and information systems in order to protect those investments.

Pet. Br. 35-36. The government also argues that use of the NACI background investigation to protect its facilities and information systems is necessary regardless of whether the subject Caltech employees are "low risk." *Id.* at 36. Thus, the government asserts that it has required that "*all* JPL employees" must undergo NACI background investigations. *Id.* at 11 (emphasis added).

The record below, however, indicates that in reality, the government does not apply the NACI background investigation requirement consistently to all Caltech employees who work at JPL facilities. While the government would require all non-faculty Caltech employees to undergo the NACI background investigation in order to obtain long-term access to JPL facilities, it would excuse Caltech faculty members who work at JPL from the NACI background investigation if they do not have access to JPL "data systems." C.A. App. at 1354-55, 1427-29. NASA's apparent decision to allow some Caltech faculty members long-term access to the JPL facilities without requiring completion of a NACI background investigation is inconsistent with NASA security procedures which require that "no contractor employee" may have access to NASA facilities without "submission of required investigated paperwork required to complete the "Inquiries portion of the NACI . . ." NPR 1600.1, § 4.5.1 (2005); J.A. 154.

The implications of NASA's apparent decision to waive the NACI background investigation require-

ment for one category of Caltech employees working at JPL, *i.e.*, faculty members who lack access to data systems, are not addressed in either party's opening brief. UCS believes, however, that NASA's creation of an exception to the background investigation requirement for one particular group of Caltech employees significantly undermines the credibility of the government's argument that in order to protect its proprietary interest in the JPL facilities, it must broadly apply the NACI background investigation to "all" Caltech employees before permitting long-term access to JPL. Pet. Br. 11.

Under the circumstances, the Court should reject the government's claim to broad authority over Caltech employees as proprietor of JPL and remand the case for an appropriate balancing between the government's role as proprietor and the privacy interests of the Caltech scientists who work at JPL.

III. THE COURT SHOULD AVOID SETTING A PRECEDENT THAT WOULD DEGRADE THE INDEPENDENCE AND THEREBY DIMINISH THE QUALITY OF WORK BY ACADEMIC AND RESEARCH INSTITUTIONS ASSOCIATED WITH FFRDCS.

UCS believes that the federal policy of protecting the independence of scientific research at FFRDCs from undue government interference is vital to the maintenance of vigorous and high-quality government-sponsored scientific research in the United States. As Vannevar Bush observed in *Science: the Endless Frontier*:

> The publicly and privately supported colleges, universities, and research institutes are the centers of basic research. They are the wellsprings

> of knowledge and understanding. As long as they are vigorous and healthy and their scientists are free to pursue the truth wherever it may lead, there will be a flow of new scientific knowledge to those who can apply it to practical problems in the government, industry and elsewhere.

Id. at 7. By asking the Court to find that NASA has unfettered authority over the Caltech scientists as their employer or as proprietor of JPL, the government proposes a serious incursion on the independence of academic and research institutions such as Caltech. A decision upholding the government's position could have a significant detrimental effect on the constitutional rights of any employee of an independent academic or research institution who works at an FFRDC.

A decision that the government stands in the shoes of the Caltech scientists' employer in this case would also send a message throughout the scientific and academic community in the U.S. that scientific research at FFRDCs has lost its freedom from government intrusion. UCS is concerned that such a message would discourage the country's best scientists from seeking positions at academic and research institutions associated with FFRDCs. As demonstrated in many of the declarations by Caltech scientists that were filed in the District Court, protection of their privacy from government invasion was a factor in their decisions to seek Caltech positions that would allow them to work at JPL. *E.g.*, C.A. App. at 1374, 1409.

UCS is also concerned that out of an understandable desire to avoid the loss to JPL of distinguished

Caltech faculty members who are unwilling to undergo intrusive background investigations, the government has made selective and unfair application of the background investigation requirement. By quietly creating a double standard for Caltech faculty members and other Caltech scientists who work at JPL, the government may foster resentment between faculty and non-faculty scientists working at JPL, thereby undermining the collegial atmosphere which is so important to the success of scientific research. The government's creation of a double standard for faculty and non-faculty Caltech scientists working at JPL also diminishes the attractiveness of both institutions as scientific workplaces.

In the long term, if Caltech is unable to attract the same high caliber scientists to work at JPL as it has in the past, the quality of work produced under Caltech's contracts with the federal government will decline, thus defeating one of the government's central goals in establishing FFRDCs and potentially eroding the critical contributions FFRDCs make to the scientific enterprise in the U.S.

CONCLUSION

For the foregoing reasons, the Court should find that the government's claim to broad powers over the Caltech scientists as their employer or as proprietor of the JPL facilities is inconsistent with the government's own regulations and policies and that the government's own actions undermine its argument that the exercise of those powers is necessary.

Respectfully submitted,

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